

No. 92-166-CFX
Status: GRANTED

Title: Keene Corporation, Petitioner
v.
United States

Docketed:
July 22, 1992

Court: United States Court of Appeals for
the Federal Circuit

Counsel for petitioner: Kazajian, John H., Taranto, Richard G.

Counsel for respondent: Solicitor General, Hollingsworth, Joe G.

Ptn mailed July 22; recd July 27, 1992

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|---|
| 1 | Jul 22 1992 | G | Petition for writ of certiorari filed. |
| 3 | Aug 27 1992 | | Order extending time to file response to petition until September 25, 1992. |
| 4 | Sep 25 1992 | | Brief amici curiae of Cheyenne-Arapaho Tribes of Oklahoma and Southern Ute Tribe filed. |
| 5 | Sep 25 1992 | | Brief of respondent United States in opposition filed. |
| 6 | Sep 30 1992 | | DISTRIBUTED. October 16, 1992 |
| 7 | Oct 8 1992 | X | Reply brief of petitioner filed. |
| 8 | Oct 19 1992 | | Petition GRANTED. ***** |
| 10 | Nov 23 1992 | | Order extending time to file brief of petitioner on the merits until December 10, 1992. |
| 11 | Dec 2 1992 | | Brief amici curiae of Cheyenne-Arapaho Tribes of Oklahoma and Southern Ute Tribe filed. |
| 12 | Dec 3 1992 | | Brief amicus curiae of Hawaii filed. |
| 20 | Dec 4 1992 | | Brief amici curiae of Pacific Legal Foundation, et al. filed. |
| 18 | Dec 9 1992 | | Brief amici curiae of C. Robert Suess, et al. filed. |
| 19 | Dec 9 1992 | | Joint appendix filed. |
| 22 | Dec 9 1992 | | Brief amicus curiae of Defenders of Property Rights filed. |
| 13 | Dec 10 1992 | | Brief amici curiae of Whitney Benefits, Inc., et al. filed. |
| 14 | Dec 10 1992 | | Brief of petitioner filed. |
| 15 | Dec 10 1992 | | Brief amicus curiae of Dico, Inc. filed. |
| 16 | Dec 10 1992 | | Brief amicus curiae of Chamber of Commerce filed. |
| 17 | Dec 10 1992 | | Brief amicus curiae of National Association Home Builders filed. |
| 23 | Dec 10 1992 | | Brief amicus curiae of Alaska filed. |
| 25 | Jan 7 1993 | | Order extending time to file brief of respondent on the merits until January 25, 1993. |
| 26 | Jan 25 1993 | | Brief of respondent United States filed. |
| 27 | Feb 1 1993 | D | Motion of Dico, Inc. to withdraw amicus curiae brief filed. |
| 29 | Feb 4 1993 | | CIRCULATED. |
| 30 | Feb 5 1993 | | Record filed. |
| | | * | Partial proceedings U. S. Court of Appeals for the Federal Circuit. |
| 31 | Feb 12 1993 | | Record filed. |
| | | * | Certified proceedings United States Claims Court (2 Boxes) (Sealed Envelope) |

No. 92-166-CFX

| Entry | Date | Note | Proceedings and Orders |
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| 32 | Feb 17 1993 | X | Reply brief of petitioner filed. |
| 33 | Feb 22 1993 | | Motion of Dico, Inc. to withdraw amicus curiae brief DENIED. |
| 34 | Feb 22 1993 | | CIRCULATED. |
| 28 | Mar 3 1993 | | SET FOR ARGUMENT TUESDAY, MARCH 23, 1993. (1ST CASE). |
| 35 | Mar 23 1993 | | ARGUED. |

92-166

No.

Supreme Court, U.S.
FILED

JUL 22 1992

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JOHN H. KAZANJIAN
Counsel of Record
IRENE C. WARSHAUER
MARY BETH GORRIE
ANDERSON KILL OLICK & OSHINSKY, P.C.
Counsel for Petitioner
Keene Corporation
666 Third Avenue
New York, New York 10017
(212) 850-0700

QUESTIONS PRESENTED

1. Did the United States Court of Appeals for the Federal Circuit err in interpreting the “has pending” language in 28 U.S.C. § 1500 (“Section 1500”) by overruling four decades of decisional law on Section 1500 that was consistent with the purpose of the statute and which Congress has impliedly affirmed, thereby barring the Claims Court actions of Petitioner Keene Corporation (“Keene”)?
2. Did the Federal Circuit err when it barred Keene’s Claims Court actions against the Government for indemnity and contribution in thousands of asbestos personal injury cases, ruling that Section 1500 divested the Claims Court of jurisdiction because Keene had impleaded the Government in a single asbestos personal injury claim in federal district court thirteen years ago, even though Keene voluntarily dismissed that complaint a few months after it was filed?
3. Does the Federal Circuit’s decision deprive Keene of any opportunity to assert its indemnity claims against the Government in an appropriate forum?

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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner Keene Corporation ("Keene")¹ seeks review of a decision rendered *in banc* by the United States Court of Appeals for the Federal Circuit, *UNR Industries, Inc. v. United States*,

¹ Pursuant to Rule 29.1 of the Rules of this Court, Keene states that it has no parent companies or nonwholly-owned subsidiaries that are required to be named herein. Pursuant to Rule 14.1(b), UNR Industries, Inc., UNARCO Industries, Inc. and Eagle-Picher Industries, Inc. were parties in the proceeding before the Federal Circuit along with Petitioner Keene and the Respondent United States. GAF Corporation was *amicus curiae* in that proceeding.

962 F.2d 1013 (Fed. Cir. 1992). That decision sets forth standards for the application of 28 U.S.C. Section 1500 (1988) ("Section 1500") that vitiate a prior panel decision by the same court, *UNR Industries, Inc. v. United States*, 911 F.2d 654 (Fed. Cir. 1990). The panel decision would have allowed Keene's claims against the Government, seeking indemnification and contribution in personal injury claims brought against Keene by shipyard workers who allegedly were injured by contact with asbestos-containing products supplied by Keene's former subsidiary under Government contracts, to proceed in the United States Claims Court. The claims involve individuals who, working at United States Navy or Government contract shipyards, were exposed to products containing asbestos fiber sold by the Government and manufactured to Government specifications. The *in banc* decision has unfairly denied Keene its day in court to prove its claims against the Government with respect to the responsibility of the United States for the asbestos litigation problem facing our nation.

If this Petition is granted, Keene will urge this Court to reinstate the Federal Circuit's panel decision, which adopts an analysis of Section 1500 that is consistent with the purpose of the statute.

OPINIONS BELOW

The *in banc* opinion of the Federal Circuit is reported as *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992) ("*in banc* decision"), and is Appendix A to this Petition. The panel opinion of the Federal Circuit is reported as *UNR Industries, Inc. v. United States*, 911 F.2d 654 (Fed. Cir. 1990) ("panel decision"), and is Appendix D. The orders of the United States Court of Appeals for the Federal Circuit vacating the panel decision and granting rehearing *in banc* are reported at *UNR Industries, Inc. v. United States*, 926 F.2d 1109 (Fed. Cir. 1990 & 1991), and are Appendices B and C. The opinion of the Claims Court is reported as *Keene Corp. v. United States*, 17 Cl. Ct. 146 (1989), and is Appendix E.

JURISDICTION

The judgment of the Federal Circuit was entered on April 23, 1992, the same date as the opinion sought to be reviewed. This Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1988).

STATUTE INVOLVED

28 U.S.C. § 1500 (1988) provides:

The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

STATEMENT OF THE CASE

1. Keene was formed in 1967 and acquired substantially all of the stock of Baldwin-Ehret-Hill, Inc. ("BEH"), a Pennsylvania corporation, in 1968. BEH became a subsidiary of Keene. BEH resulted from a 1959 merger of Ehret Magnesia Manufacturing Company ("Ehret"), a Pennsylvania corporation, and Baldwin-Hill Company ("B-H"), a New Jersey corporation. In 1970, BEH was merged, and its business was transferred into another Keene subsidiary, Keene Building Products Corporation ("KBPC"). KBPC, BEH, and BEH's corporate predecessors manufactured and sold thermal insulation products and acoustical products containing asbestos.

2. Keene is a defendant in approximately 87,000 pending asbestos personal injury lawsuits, many of which involve exposure at United States Navy or Government contract shipyards, or exposure to products with asbestos fiber purchased from the United States and manufactured pursuant to Government specifications. Over the past fifteen years, Keene has spent nearly \$400 million in asbestos personal injury cases. It has been sued

over 156,000 times, and has settled or tried nearly 78,000 cases. New filings continue unchecked — 50 percent more cases have been filed to date in 1992 against Keene than in the comparable period in 1991, and new filings outpace settlements and other dispositions nearly two-to-one. In a widely publicized asbestos compensation program in July 1990, Keene offered approximately \$190 million — 80 percent of its net worth — to solve all meritorious personal injury claims. Other defendant companies are similarly situated. Sixteen former manufacturers and distributors of asbestos-containing products have already collapsed under the weight of the asbestos litigation.

3. In December 1979, Keene brought a petition against the Government in the United States Court of Claims seeking indemnification and contribution with respect to thousands of asbestos personal injury actions asserted against it by shipyard workers, *Keene Corp. v. United States*, No. 579-79C (Ct. Cl. 1979) (“*Keene I*”) (Appendix H). In June 1979, Keene had filed a third-party complaint against the United States in connection with one individual plaintiff’s personal injury claim brought against Keene in *Miller v. Johns-Manville Prods. Corp.*, No. 78-1283E (W.D. Pa. 1979) (“*Miller*”) (Appendices I and J); shortly thereafter, in April 1980, Keene voluntarily dismissed this action, stating that it had determined that the Court of Claims action (*Keene I*) “should resolve the differences between the parties.” Keene’s Motion for Voluntary Dismissal of Claim Against Third-Party Defendant United States of America, *Miller v. Johns-Manville Prods. Corp.* (Appendix G).²

4. On September 25, 1981, Keene filed a second petition in the Court of Claims, *Keene Corp. v. United States*, No. 585-81C (Ct. Cl. 1981) (“*Keene II*”) (Appendix F), claiming that the

² In January 1980, under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671, *et seq.* (“FTCA”), Keene filed an action against the Government in the United States District Court for the Southern District of New York. This action was dismissed for lack of subject matter jurisdiction on September 30, 1981. *Keene Corp. v. United States*, No. 80-0401 (S.D.N.Y.), *aff’d*, 700 F.2d 836 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

Government’s Federal Employees’ Compensation Act recoupments of monies which Keene paid in asbestos personal injury settlements or judgments amounted to an unlawful taking of Keene’s property without compensation.

5. Pursuant to Section 1500, the Government moved to dismiss *Keene I* in 1980, but the Court of Claims denied the motion in an unpublished *per curiam* order. Seven years later, in 1987, the Government moved to dismiss *Keene I* and *Keene II*, which were still pending, in addition to Claims Court actions brought by six other manufacturers of asbestos-containing products.³ Although the Government’s motion was filed at the request of the Claims Court *sua sponte*, the Claims Court declined to rule on the Government’s motion to dismiss Keene’s claims. *Keene Corp. v. United States*, 12 Cl. Ct. 197, 198-99 n.1 (1987), *aff’d sub nom.*, *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988) (*per curiam*), *cert. denied*, 489 U.S. 1066 (1989) (“*Johns-Manville Corp.*”). On that appeal, the Federal Circuit considered the unsettled question of *what* constitutes a “claim”, which a Claims Court plaintiff has pending in any other court against the United States, that would require the Claims Court to decline jurisdiction. It ruled that for Section 1500 purposes, a “claim” is defined by the operative facts alleged. *Johns-Manville Corp.*, 855 F.2d at 1563-64, 1567. The Federal Circuit did not address the issue of *when* a claim had to be “pending” to invoke the bar of Section 1500.

6. In 1988, after the Federal Circuit’s decision in *Johns-Manville Corp.*, the Government moved for summary judgment

³ This motion was purportedly based on Section 1500 grounds and Keene’s commencement of a second omnibus FTCA action in the District of Columbia federal court, *Keene Corp. v. United States*, No. 82-2120 (D.D.C. filed July 28, 1982). Relying on the dismissal of Keene’s first FTCA action, the D.C. Circuit dismissed Keene’s second FTCA action for lack of subject matter jurisdiction in July 1984. *Keene Corp. v. United States*, 591 F. Supp. 1340 (D.D.C. 1984), *aff’d sub nom.*, *GAF Corp. v. United States*, 818 F.2d 901 (D.C. Cir. 1987).

on complaints filed by Keene and other Claims Court asbestos claimants. It asserted that the Claims Court lacked subject matter jurisdiction over *Keene I* and *Keene II*, declaring that Keene had an identical claim pending against the Government in another forum when Keene filed its Claims Court actions. The Claims Court held that Keene's 1979 claim in *Miller*, extinguished voluntarily by Keene only months after its filing, nonetheless deprived the Claims Court of jurisdiction over *Keene I* pursuant to Section 1500 because *Miller* was filed several months earlier than *Keene I*; *Keene II* was similarly dismissed. This decision ignored the fact that *Miller* had been dismissed when Keene announced that it had decided to seek recovery in Claims Court in *Keene I*, and that Keene's FTCA claims had been dismissed for lack of subject matter jurisdiction.

7. Without considering the limited nature of Keene's third-party complaint against the Government in *Miller*, but simply focusing upon its existence, the Claims Court merged that complaint with the pending federal court actions of several other asbestos claimants and concluded that "[a]ll complaints in other courts and the Claims Court cases seek recovery for costs and expenses incurred and other damages engendered by suits brought by shipyard workers against plaintiffs alleging injury from exposure to asbestos or asbestos products." *Keene Corp. v. United States*, 17 Cl. Ct. 146, 156 (1989).

8. In 1990 the Federal Circuit reversed the Claims Court decision as to Keene. The court examined Section 1500's textual changes from its pre-enactment form in 1868 to its amendment in 1948, and considered various interpretations of the phrase "has pending", given the act's legislative intent, subsequent history and interpretation by federal judges over the past forty years. The panel majority discussed the problem of determining *when* a claim should be considered pending; it concluded that the text provides no rigid test, such as a filing date, for resolving with certitude when a claim is "pending" in order to deny Claims Court jurisdiction under Section 1500. The court found no reliable evidence of Congressional intent on this question. It ruled that jurisdiction exists if a Claims Court plaintiff's

earlier-filed district court action is dismissed "before the Claims Court entertains and acts" on a Section 1500 motion to dismiss, even though the Claims Court action was filed before the district court action was dismissed. *UNR Industries, Inc. v. United States*, 911 F.2d 654, 665-66 (Fed. Cir. 1990). The *Miller* third-party action, therefore, was held not to bar Keene's Claims Court actions.

9. The Federal Circuit granted the Government's motion for a rehearing *in banc*, vacated the panel decision, and asked the parties to brief these issues:

(a) Whether the term "has pending" as used in 28 U.S.C. § 1500 (1988) can be properly construed to mean pending at the time the Claims Court first entertains and acts on a Government motion to dismiss (or its equivalent), regardless of when the Claims Court suit was actually filed; or whether the term "has pending" is properly construed to mean pending at the time when the Claims Court suit was filed;

(b) Whether the case of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966) should be overruled;

(d) Whether the rule announced in *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989), for determining what is a claim under § 1500 should be reconsidered, and if so, what should be the proper rule.

UNR Industries, Inc. v. United States, 926 F.2d 1109, 1110 (Fed. Cir. 1991).

10. Upon rehearing *in banc*, the Federal Circuit affirmed the Claims Court decision and held that Section 1500 deprived the Claims Court of jurisdiction over Keene's claims. It held that the term "has pending" means pending at the time the Claims Court suit was filed, and if the same claim is pending in another court *before or after* the Claims Court complaint is filed, Section

1500 divests the Claims Court of jurisdiction, regardless of when an objection is raised and acted upon. *UNR Industries, Inc. v. United States*, 962 F.2d at 1020-21. In reaching this conclusion, the Federal Circuit overruled *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966) (which held that a claim filed against the United States in another court *after* a Claims Court action is filed does not divest the Claims Court of jurisdiction under Section 1500); *Boston Five Cents Savings Bank v. United States*, 864 F.2d 137 (Fed. Cir. 1988); *Brown v. United States*, 358 F.2d 1002 (Ct. Cl. 1966); *Hossein v. United States*, 218 Ct. Cl. 727 (1978); and *Casman v. United States*, 135 Ct. Cl. 647 (1956). The Federal Circuit particularly characterized *Tecon* as "aberrational." *UNR Industries, Inc. v. United States*, 962 F.2d at 1023.

SUMMARY OF REASONS FOR GRANTING THE PETITION

First: The Federal Circuit's sweeping decision overruling cases interpreting the "has pending" language of Section 1500, including *Tecon*, is a radical exercise in judicial legislation dissolving four decades of decisional law which Congress has impliedly approved. Indeed, Congress let those cases stand while modifying numerous other jurisdictional and procedural rules. According to these cases overruled by the Federal Circuit, in determining whether a non-Claims Court action is "pending" within the meaning of Section 1500, a court must consider the nature, status and disposition of that action, and not *just* its filing date.

Second: The Federal Circuit erroneously concluded that the *Miller* third-party action embraced the same operative facts as *Keene I*, but failed to examine the elements of each action. The Federal Circuit simply ignored the fact that these two actions do not allege the same facts or involve similar complaints. Section 1500 cannot require the Claims Court to dismiss *Keene I* because it involves a different claim from the earlier-filed *Miller* litigation, and *Miller* was voluntarily dismissed by Keene.

Third: The purpose of Section 1500, which had its genesis in a Civil War-era statute enacted before the development of *res judicata* principles, was to prevent a litigant from forcing

the Government to defend against duplicative litigation; but Keene has not yet had a single opportunity to argue in an appropriate forum the merits of its claims against the United States regarding the Government's responsibility for the asbestos litigation problem facing our nation.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's *in banc* decision, overruling *Tecon* and other longstanding precedent construing the "has pending" language of Section 1500, is a radical exercise in judicial legislation; it effectively deprives many litigants of any opportunity to bring claims against the Government.

A. *Tecon*, *Boston Five Cents*, *Brown*, *Hossein* and *Casman* should not be overruled because they advance the purpose of Section 1500, which is to protect the Government against duplicative litigation.

Prior to the Federal Circuit's *in banc* decision, all authorities construing the meaning of Section 1500 agreed that its purpose was to conserve Government resources and "to relieve the United States from defending the same claims in two courts *at the same time* . . ." *UNR Industries, Inc. v. United States*, 911 F.2d at 663 (panel majority) (emphasis in original). See also *Johns-Manville Corp.*, 855 F.2d at 1562; *Connecticut Dep't of Children & Youth Serv. v. United States*, 16 Cl. Ct. 102, 104 (1989); *Casman v. United States*, 135 Ct. Cl. 647 (1956) (overruled by the *in banc* decision). Section 1500 thus is a *jurisdiction-depriving* rather than *jurisdiction-conferring* statute.

In explaining the difference between the federal diversity jurisdiction statute, 28 U.S.C. § 1332 (1988), and Section 1500, the Federal Circuit panel in this case observed:

Section 1332 creates jurisdiction in a federal court where none would otherwise exist, i.e., no subject matter jurisdiction. The purpose behind § 1500, on the other hand, is to save the Government from having to defend the same suit in two different courts at the

same time. Section 1500 takes away jurisdiction even though the subject matter of the suit may appropriately be before the Claims Court. Operationally these two statutes focus on different points in time. The former says, "ordinarily your subject matter cannot be here, but if you satisfy the requirements of this statute, then you may *go ahead and proceed* in federal court." The latter says, "though your subject matter may appropriately be here in the Claims Court, if you come within the proscriptions of this statute, then you *may no longer proceed* here."

UNR Industries, Inc. v. United States, 911 F.2d at 663-64 (emphasis in original). Section 1500, a Reconstruction-era statute originally enacted to protect the Government against vexatious suits by Confederate property owners, was intended to provide the Government with a shield against duplicative litigation, not a sword to cut off the substantive rights of litigants.

Section 1500 requires the Claims Court to look past its own jurisdictional bounds; it must determine: (1) whether a Claims Court plaintiff has filed a non-Claims Court action; (2) if so, whether that action involves substantially the same claim as the Claims Court action; and (3) whether the plaintiff is attempting to force the Government to defend itself in two places at once, or successively. See *UNR Industries, Inc. v. United States*, 911 F.2d at 666 (panel majority); *Tecon*, 343 F.2d at 949.

Tecon held that in determining whether a non-Claims Court action is "pending" within the meaning of Section 1500, a court must examine the nature, status and disposition of that action, as well as its filing date. This principle conforms to the legislative intent of Section 1500, is consistent with prior Section 1500 holdings, and is in harmony with established rules of comity and concurrent jurisdiction.

The plaintiff in *Tecon* filed a complaint in the district court on admittedly identical claims which already were before the Claims Court. It brought its district court action *after* its Claims Court complaint was filed. The plaintiff moved to dismiss the

Claims Court petition because it then "had pending" an identical claim in district court. The Claims Court denied the plaintiff's motion because the facts and circumstances on the date the complaint was filed in the Claims Court confirmed that there was no other suit or process in another court. *Tecon* thus preserved Section 1500 as a shield, because the Government was not required to defend in another court the claims it had already defeated in the Claims Court, even though the plaintiff was literally correct that it "had pending" a claim in another forum.

Tecon followed the reasoning and result in *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940), in which the plaintiff filed identical actions in the Court of Claims and the district court. The plaintiff prosecuted its claims in the district court through final appeals to the court of appeals, and *certiorari* was denied. The plaintiff then turned to its still-pending action in the Court of Claims and the Government moved to dismiss under the predecessor to Section 1500. The Court of Claims dismissed on the grounds that at the time of filing in the Court of Claims the plaintiff had pending, and elected to prosecute to a decision on the merits, an identical claim in another court.

The only difference between *Tecon* and *British American Tobacco* is that the plaintiff in *Tecon* elected to prosecute the merits in the Claims Court first. In both cases Section 1500 and its predecessor shielded the Government from defending the same action successively in two different courts where the only jurisdiction question raised was the applicability of Section 1500 or its predecessor. See also *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 152 F. Supp. 236 (Ct. Cl. 1957).

Following this approach, the Federal Circuit's panel decision properly concluded that focusing only on whether another action existed on the filing date of the Claims Court action "too early cuts off the recourse of litigants who, either because of subject matter or other circumstances, may be found entitled to pursue their claims only in the Claims Court, and who would not otherwise violate the policy behind Section 1500." *UNR*

Industries, Inc. v. United States, 911 F.2d at 664. The panel decision properly recognized that a simplistic date-of-filing rule, later propounded in the *in banc* decision, would convert Section 1500 from a jurisdictional shield into a broadsword, severing a Claims Court plaintiff's sole opportunity to pursue its claim. Under the rigid standard now dictated by the *in banc* decision, the "election either to leave the Court of Claims or to leave the other courts" envisioned by the original author of Section 1500, *id.* at 660, is illusory.

Stare decisis commands deference to the long-established construction of a statute, because Congress is free to modify such judge-made law. See *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) ("Considerations of *stare decisis* have special force in the area of statutory interpretation [because] the legislative power is implicated, and Congress remains free to alter what [judges] have done."). Congress has respected the line of authority overruled by the Federal Circuit's *in banc* decision: despite the fundamental changes it has wrought in federal procedural rules over the years, Congress has declined to countermand the rules in those decisions interpreting application of Section 1500. Therefore, Keene's Petition should be granted to allow this Court to review the *in banc* decision.

B. The Federal Circuit's attempt to draw a new "bright line" rule creates confusing new jurisdictional questions for litigants.

The Federal Circuit's effort to create a "bright line" for Claims Court judges actually opens a new frontier of confusing jurisdictional rules to trap litigants with claims or potential claims against the Government, and may deprive them of any chance to assert claims against the United States. As the court observed in *Brown v. United States*:

Section 1500 was not intended to compel claimants to elect, at their peril, between prosecuting their claim in [the Claims Court] (*with conceded jurisdiction*, aside from Section 1500) and in another tribunal which is without jurisdiction. *Once the claim has been*

rejected by the other court for lack of jurisdiction, there is no basis in the policy or working of the statute for dismissal of the claim pending here.

358 F.2d at 1005 (emphasis added). *Brown* was overruled by the Federal Circuit's *in banc* decision.

At the very least, the doctrine of "equitable tolling" would allow the Claims Court to defer its decision on jurisdiction where a similar action is pending in another court, until facts can be fully examined in that forum which may more precisely inform the Claims Court's deliberations. This is exactly the approach employed in *Hossein v. United States*, 218 Ct. Cl. 727 (1978) (overruled by the *in banc* decision), and suggested by Federal Circuit Chief Judge Nies and Judge Plager in response to the *in banc* majority. *UNR Industries, Inc. v. United States*, 962 F.2d at 1025-26 (Nies, J., additional views), and *id.* at 1026-30 (Plager, J., dissenting). See also *Irwin v. Veterans Admin.*, ___ U.S. ___, 111 S. Ct. 453 (1990) *reh'g denied*, ___ U.S. ___, 111 S. Ct. 805 (1991) (equitable tolling may be available in actions against the United States government).

C. If the *Tecon* rule is modified, a court should only do so prospectively.

The Federal Circuit's attempt to streamline the "has pending" issue under Section 1500 will have the unintended effect of raising a multitude of questions for current litigants who find the rules have just changed in mid-inning because the court's overruling of *Tecon* will apply retroactively.

Even if this Court were to abandon the *Tecon* rule, it should do so only prospectively. See *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971) (setting forth a three-part test to determine whether a new rule announced in a decision should be applied retroactively); *American Trucking Ass'n, Inc. v. Smith*, 496 U.S. 167, 178 (1990) (affirming the *Chevron* standard to govern retroactivity of civil rules). Overruling *Tecon* destroys a well-established standard relied on by innumerable litigants. Here, as in *Chevron*, "[i]t cannot be assumed that [the litigant]

did or could foresee that this consistent interpretation of the [statute] would be overturned." 404 U.S. at 107. Indeed, as the Claims Court itself specifically noted with respect to these cases:

[E]ven if *Tecon Engineers* were not binding authority, this court would deny [the Government's] motion regarding later-filed suits. If *Tecon Engineers* is no longer to be the rule, the change should be prospective. Reliance of plaintiffs in the asbestos cases on *Tecon Engineers* was not frivolous.

Keene Corp. v. United States, 12 Cl. Ct. at 216.

Substantial inequitable consequences will result from overruling *Tecon* retroactively.

II. Section 1500 cannot require dismissal of Keene's Claims Court actions because they embrace substantially different facts from those involved in *Miller*.

The Federal Circuit's *in banc* decision dismissed *Keene I*, determining that *Miller* raised substantially the same issues and that the two actions should be considered the same claim for Section 1500 purposes. It held that the Claims Court therefore had no jurisdiction.

However, the two actions are not substantially related: the claim raised in *Miller* differs markedly from the claim raised in *Keene I*, and they do not "allege" the same facts. *Keene I* was an omnibus action seeking Government indemnity and contribution for thousands of personal injury claims filed against Keene by workers employed on naval vessels or in shipyards owned by the Government or operated under Government contracts during a concentrated construction program necessitated by the Second World War and the national defense. Keene asserted that the Government's knowledge of alleged asbestos hazards was superior to Keene's, yet the Government's contracts specified use of asbestos-containing materials. Further, Keene alleged that the Government's lax safety precautions created dangerous levels of exposure in work areas frequented by plaintiffs.

In stark contrast, it does not appear that the *Miller* plaintiff worked in a shipyard, nor does her complaint allege that her employment involved Keene's contracts with the Government, how she was exposed to asbestos-containing materials, or even what asbestos products she handled. Keene's third-party complaint against the Government in *Miller* did not seek to adjudicate the Government's conduct, but merely averred that, during the period of plaintiff's alleged exposure, if she "was exposed to dust or fibers of asbestos products, those products were supplied by the United States Government pursuant to specifications instituted by the United States Government and required by the United States Government Contracts." Keene's Amended Third Party Complaint at ¶ 7 (Appendix I-2-3). Keene has not filed any other third-party complaints against the Government in connection with other asbestos claims; nevertheless, the Federal Circuit has seized upon the anomalous *Miller* third-party complaint to bar Keene from pleading its omnibus case against the Government in the Claims Court.

Moreover, the damage claims asserted in *Keene I* are of a far greater magnitude than those asserted by the sole plaintiff in *Miller*. Keene's liability was not yet established when it impleaded the Government in *Miller*, but it had incurred considerable expense in settlement and litigation costs when it filed *Keene I*.

Finally, Keene's motion for a voluntary dismissal of its third-party claim against the Government in *Miller* expressly stated that it had "instituted an action in the Court of Claims against the United States of America which should resolve the differences between the parties." Keene's Motion for Voluntary Dismissal of Claim Against the Government of the United States of America at ¶ 3, (Appendix G-2). This straightforward statement to the court underscores Keene's honest effort to select the proper forum for its indemnity claim. Plainly, Keene was not attempting to force the Government to defend itself in two places at once.

Keene's impleader of the government in *Miller* should be viewed for what it was — a prophylactic measure to preserve all

available defenses in that one case; its voluntary dismissal should have rendered the third-party complaint a nullity.⁴ Curiously enough, the Second Circuit affirmed dismissal of Keene's FTCA claim against the Government because Keene failed to implead the Government in claims brought against it in federal district court.⁵ *Keene Corp. v. United States*, 700 F.2d 836, 842-43 n.10 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983). This quandary is aggravated, not resolved, by the Federal Circuit's *in banc* decision; it has the effect of penalizing Keene for its voluntary dismissal in *Miller*.⁶

III. Keene has been stripped of any opportunity to air its claims against the Government.

All parties agree that no litigant deserves two bites at the apple, but the Federal Circuit's *in banc* decision deprives Keene of even its first nibble. A plaintiff cannot mount an attack on the Government in two different courts at once, but the Federal Circuit's drastic new rule allows the Government to wield Section 1500 offensively, slamming the Claims Court door against many litigants whose claims are now pending.

⁴ Where a plaintiff moves for voluntary dismissal, the withdrawn claim is treated as if it had never been filed. *See, e.g., A.B. Dick Co. v. Marr*, 197 F.2d 498, 502 (2d Cir.), *cert. denied*, 344 U.S. 878, *reh'g denied*, 344 U.S. 905 (1952); *Navajo Tribe of Indians v. United States*, 601 F.2d 536, 540 (Ct. Cl. 1979), *cert. denied* 444 U.S. 1072 (1980). *See also* C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2367 at 184-87 (1971), and at 54-55 (1992 Pocket Part).

⁵ The Second Circuit further observed that the FTCA is not an appropriate vehicle for prosecuting mass tort indemnification claims against the government, because mass tortfeasors cannot plead damages with sufficient particularity for FTCA notice requirements. *Keene Corp. v. United States*, 700 F.2d 836, 845 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

⁶ Keene also had argued that the district court's dismissal of its FTCA action required the Claims Court to retain jurisdiction over *Keene II* because the district court held that jurisdiction over Keene's claim for the unconstitutional taking of its property lies exclusively in the Claims Court. The Federal Circuit's *in banc* decision summarily rejected Keene's position, stating that "this relies on the exception *Casman* opened up, and as of today, *Casman* and its progeny are no longer valid." *UNR Industries, Inc. v. United States*, 962 F.2d at 1024.

A court must hold the Government-as-defendant to the same standards it would apply in a contribution claim against General Motors; it cannot erect "roadblocks against claimants seeking to assert a government liability, [if] such blocks would not exist in the case of a suit against a private company." *Johns-Manville Corp.*, 855 F.2d at 1568-70 (per curiam), (Nichols, J., dissenting), *cert. denied*, 489 U.S. 1066 (1989). Protecting the Government from the consuming vortex of asbestos litigation may find policy justification in some quarters, but it cannot excuse the Government from answering Keene's claim for contribution in connection with the millions it has spent to compensate naval shipyard workers. The Federal Circuit's *in banc* decision creates a judicial whipsaw which penalizes Keene and other Government contractors who aided the war effort and the national defense.

Keene is entitled the same access to federal courts guaranteed to all citizens. To forbid Keene an opportunity to litigate its indemnification claim is to raise a disturbing policy question: could the specter of huge liability without Government indemnity, where there is responsibility on the part of the Government, inhibit Government contractors' production of goods in a national emergency? If the manufacturers who have been involved in this litigation knew then what they know now, could they have fully investigated any charges of asbestos hazards and delivered those battleships in time for D-Day?

The Federal Circuit's *in banc* decision distorts the letter and the spirit of Section 1500. The statute was originally designed to protect depleted public resources in the wake of the Civil War's devastation, and prevented Confederate property owners from mounting legal battles on two fronts against the Government they had attacked at Fort Sumter. Today the doctrine of *res judicata* blocks such vexatious tactics; but the Federal Circuit's broadside has the dangerous effect of sealing off a Government contractor from any appropriate forum for its indemnification claim.

IV. Keene's continuing position in the national asbestos litigation dilemma justifies an examination of whether the Government bears any responsibility to Keene.

Asbestos litigation in this country has been termed an "impending disaster."⁷ It has been a tragedy for those individuals with meritorious personal injury claims, for the producer companies that have been sued principally under theories of product liability for compensatory and punitive damages, and for the civil justice system — both federal and state — that has been burdened with untold thousands of these claims. Keene has been sued over 156,000 times, and it has settled or tried nearly 78,000 cases. Many of the cases Keene has resolved and many of the 87,000 asbestos personal injury lawsuits now pending against Keene involve exposure at United States Navy or Government contract shipyards, or exposure to products with asbestos fiber purchased from the Government and manufactured pursuant to Government specifications. Keene has spent nearly \$400 million in asbestos personal injury cases.

Keene has recognized an obligation to provide fair compensation when appropriate; it recently offered approximately 80 percent of its net worth to compensate all meritorious personal injury claims. Nonetheless, there is a limit to Keene's resources; new filings outpace dispositions by a factor of almost two-to-one. Asbestos litigation has rendered sixteen producers insolvent, and imperils the viability of many others.⁸ This Court has

⁷ See *Report of the Ad Hoc Committee*, Judicial Conference Ad Hoc Committee on Asbestos Litigation (March 1991) at 26, cited in Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?* 13 Cardozo L. Rev. 1819 n.1 (1992).

⁸ Brickman, *supra* note 7 at 1819 n.2. The courts have acknowledged the consequences of this dilemma:

Overhanging th[e] massive failure of the present system is the reality that there is not enough money available from traditional defendants to pay for current and future claims. Even the most

(Footnote continued)

recognized that damages must be imposed according to a rational and systematic process. *Pacific Mutual Life Ins. Co. v. Haslip*, ___ U.S. ___, 111 S. Ct. 1032 (1991).⁹ Whether the Government owes contribution and indemnity to Keene is an issue for judicial examination on the merits; procedural reinterpretation of a statute that has bedeviled jurists for decades should not dictate the outcome of this critical debate.

Section 1500 cannot be viewed in an abstract void. The Federal Circuit's *in banc* decision ignores not only the purpose and policy of the statute, but also the very real consequences to Keene; its construction of Section 1500 slams the Claims Court door because Keene impleaded the Government[†] on a single claim thirteen years ago, then withdrew it a few months later. When it redrew Section 1500, the Federal Circuit magnified a procedural point over the purpose of that statute.

In dissenting from the Federal Circuit's *in banc* decision in this case, Judge Plager wrote:

Congress presumably could have immunized the Federal Government from any liability for its asbestos-related activities; it did not. By general law, Congress has provided the citizens of this country an opportunity to fairly litigate their claims against the United States in the courts of the land. These plaintiffs [including Keene], through no fault of their own, have

conservative estimates of future claims, if realistically estimated on the books of many present defendants, would lead to a declaration of [their] insolvency

In re Joint E. & S. Dist. Asbestos Litig. (Findley v. Blinken), 129 B.R. 710, 933 (E. & S.D.N.Y. 1991), quoted in Brickman, *supra*, at 1820 n.4. See also Oliver & Spencer, *Who Will the Monster Devour Next?*, *Forbes*, Feb. 18, 1991, at 79, cited in Brickman, *supra*, at 1820 n.3.

⁹ See also Brickman, *supra*, at 1819-40; *Report of the Ad Hoc Committee*, *supra* note 7, at 26.

not had that opportunity. I do not know whether the Government did anything that would make it liable under the law to these plaintiffs, but I do believe that § 1500 was not intended to deny them the opportunity to find out

UNR Industries, Inc. v. United States, 962 F.2d at 1030 (Plager, J., dissenting).

CONCLUSION

Keene's Claims Court actions should not have been dismissed pursuant to Section 1500. Keene did not have any actions pending against the United States when the Claims Court acted upon the Government's motions to dismiss in that Court; therefore, Keene did not fit within the proscription of Section 1500. The Federal Circuit's *in banc* decision is consistent neither with the history and purpose of the statute nor the judicial precedent construing Section 1500. The Federal Circuit overruled this precedent to arrive at its conclusion. Further, the *Miller* third-party action is not the same claim as that asserted by Keene in the Claims Court. Finally, Keene should be given an opportunity to litigate the merits of its claims against the United States.

Keene respectfully requests that this Court grant its Petition and reverse the decision below.

Respectfully submitted,

JOHN H. KAZANJIAN
Counsel of Record

IRENE C. WARSHAUER
MARY BETH GORRIE
ANDERSON KILL OLICK &
OSHINSKY, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-0700

Counsel for Petitioner
Keene Corporation

APPENDIX A

**UNR INDUSTRIES, INC., Unarco Industries, Inc., and Eagle
Picher Industries, Inc., Plaintiffs-Appellants.**

v.

The UNITED STATES, Defendant-Appellee.

**KEENE CORPORATION,
Plaintiff-Appellant.**

v.

The UNITED STATES, Defendant-Appellee.

Nos. 89-1638, 89-1639 and 89-1648.

**United States Court of Appeals,
Federal Circuit.**

April 23, 1992.

Joe G. Hollingsworth, Spriggs & Hollingsworth, Washington, D.C., argued for plaintiffs-appellants. With him on the brief were William J. Spriggs, Paul G. Gaston and Catherine B. Baumer, of counsel.

John H. Kazanjian, Anderson, Kill, Olick & Oshinsky, P.C., New York City, argued for plaintiff-appellant. With him on the brief were John E. Kidd, Walter G. Marple, Jr. and Arthur S. Olick. Also on the brief were Paul C. Warnke, Harold D. Murry, Jr., and Philip H. Hecht, Howrey & Simon, Washington, D.C.

Robert M. Loeb, Civil Div., Dept. of Justice, Washington, D.C., argued for defendant-appellee. With him on the brief were Stuart M. Gerson, Asst. Atty. Gen. and Barbara C. Biddle. Also on the brief were J. Patrick Glynn and David S. Fishback, Torts Branch, Civil Div., Dept. of Justice, of Washington, D.C.

Sidney S. Rosdeitcher, David G. Bookbinder, Theodore F. Haas and Robert N. Kravitz, Paul, Weiss, Rifkind, Wharton &

Garrison, of New York City, were on the brief for amicus curiae, GAF Corp.

Before NIES, Chief Judge, RICH, NEWMAN, ARCHER, MAYER, MICHEL, PLAGER, LOURIE, CLEVINGER, and RADER, Circuit Judges.

MAYER, Circuit Judge.

This is a rehearing in banc of an appeal from the United States Claims Court, 17 Cl.Ct. 146 (1989), which dismissed the cases of UNR Industries, Inc., Eagle-Picher Industries, Inc., and Keene Corporation because it lacked jurisdiction under 28 U.S.C. § 1500 (1988). An earlier judgment and the opinion of this court, 911 F.2d 654 (Fed.Cir.1990), were vacated, 926 F.2d 1109 (Fed.Cir.1990). We now affirm the judgment of the Claims Court.

Background

Appellants, manufacturers of asbestos products or suppliers of asbestos, sued in the Claims Court for indemnification by the government against liabilities incurred in personal injury suits brought against them by shipyard workers exposed to asbestos. As of the filing of the Claims Court actions, each of the appellants had cases based on the same facts pending in federal district courts. Therefore, the Claims Court dismissed their suits on the authority of 28 U.S.C. § 1500, which reads:

The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

We set out here only a brief description of the appellants and their activities. A more comprehensive scenario is contained in

the Claims Court opinion. UNR Industries, Inc. (UNR) and Eagle-Picher Industries, Inc. (Eagle-Picher) are among the many defendants in *In re All Maine Asbestos Litigation*, Master Asbestos Docket (D.Me.), a consolidation of 225 suits brought by present or former shipyard workers or their representatives claiming injury from exposure to asbestos at the Bath Iron Works, a private shipyard, and the Portsmouth Naval Shipyard, both in Maine. On July 21, 1982, the defendants in that litigation, including UNR and Eagle-Picher, filed third-party complaints for contribution or indemnification against the United States in the United States District Court for the District of Maine. The third-party complaints were drafted pursuant to model complaints and were based on theories of negligence, strict liability, and breach of warranty. Model Complaint A dealt with injuries allegedly incurred at the Bath Iron Works, while Model Complaint B dealt with injuries alleged at the Portsmouth Naval Shipyard. On January 16, 1984, UNR sued the United States in the Claims Court, No. 16-84C, for breach of contract based on warranties allegedly arising from the government's role in the use of asbestos in the shipyards. The Claims Court's jurisdiction over this suit is at issue today.

On July 16, 1986, the district court issued a final order dismissing Model Third-Party Complaint B. *In re All Maine Asbestos Litigation (Portsmouth Naval Shipyard Cases)*, Master Asbestos Docket (D.Me.); see also 772 F.2d 1023 (1st Cir.1985); 581 F.Supp. 963 (D.Me.1984). And on March 12, 1987, the court dismissed the last claims of Model Third-party Complaint A. *In re All Maine Asbestos Litigation (Bath Iron Works Cases)*, 655 F.Supp. 1169 (D.Me. 1987), *aff'd*, 854 F.2d 1328 (Fed.Cir.1988).

Eagle-Picher is also a defendant in cases in the Western District of Washington for asbestos-related injuries suffered by workers at the Puget Sound Naval Shipyard. As part of this litigation, on February 3, 1983, Eagle-Picher filed ten third-party complaints founded on theories of negligence, breach of warranty, and admiralty against the government. These complaints were dismissed for failure to state a claim on May 19 and June 30, 1986. *Lopez v. Johns-Manville*, 649 F.Supp. 149

(W.D. Wash.1986), *aff'd sub nom. Lopez v. A.C. & S., Inc.*, 858 F.2d 712 (Fed.Cir.1988).

On March 25, 1983, Eagle-Picher sued the government in the Claims Court to recover money paid for litigating and settling claims arising from asbestos-caused injuries. No. 170-83C. It relies on contractual theories that the government created warranties by specifying the use of asbestos and by controlling the workplace. The Claims Court's jurisdiction over this lawsuit is at issue.

Along with eight other asbestos suppliers, in 1978 Keene Corporation (Keene) was sued by the representative of a laborer allegedly injured by asbestos exposure in 1943. *Miller v. Johns-Manville Bldg. Products*, No. 78-1283E (W.D.Pa. filed Nov. 8, 1978). On June 1, 1979, Keene initiated a third-party complaint against the government, demanding indemnification or contribution because the asbestos was either supplied by, or according to the specifications of, the government. Although Keene moved to dismiss this third-party action on April 23, 1980, it is unclear whether the court acted on the motion; regardless, Keene has accepted a dismissal date of May 13, 1980.

On December 21, 1979, Keene sued in the Court of Claims on the theory that the government as an asbestos supplier and as the regulator of the workplace had made and breached various warranties appertaining to asbestos. No. 579-79-C (*Keene I*). It is seeking damages growing out of more than 5,000 suits filed against it by persons alleging injuries from asbestos exposure as early as the mid-1930's. Jurisdiction over this suit is at issue.

On January 22, 1980, Keene sued the government in the District Court for the Southern District of New York under the Federal Tort Claims Act for what it spent defending and settling thousands of lawsuits alleging asbestos-related injuries incurred as far back as the 1930's. It based this suit on theories of breach of warranty, negligence, strict liability, and the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193 (1976). On September 30, 1981, the court dismissed the suit as barred by

the doctrine of sovereign immunity. *Keene Corp. v. United States*, No. 80-Civ-0401 (S.D.N.Y. Sep. 30, 1981), *aff'd*, 700 F.2d 836 (2d Cir.1983).

On September 25, 1981, Keene filed its second suit against the government in the Court of Claims. No. 585-81C (*Keene II*). Again, it demands damages for the defense, settlement, and judgment costs of asbestos-related personal injury claims dating back to the 1930's. Further, it alleges a violation of the fifth amendment because the government recouped from Keene payments under the Federal Employees' Compensation Act that it paid to workers suffering from asbestos-related injuries. We must also decide whether the Claims Court has jurisdiction over this case.

The Claims Court interpreted section 1500 as forbidding jurisdiction "if, as of the date an action is filed, plaintiff has pending in another federal court the same claim." 17 Cl.Ct. at 155.

The jurisdictional inquiry targets the date of filing in the Claims Court, not some subsequent date, such as the date on which the Government is made aware of the antecedent action, or the date on which the Government invokes section 1500 seeking to dismiss the Claims Court action, or the date on which the Claims Court acts. Therefore, a plaintiff cannot cure a want of jurisdiction in the Claims Court by voluntarily or involuntarily dismissing its parallel action, or even by suffering a court-ordered termination on the merits.

Id. (citation omitted). The court concluded that under the standard announced in *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed.Cir.1988), the complaints of each appellant in both the district courts and the Claims Court were based on a "homogeneity of operative facts." 17 Cl.Ct. at 156. It dismissed them, as well as those of Fireboard Corporation, H.K. Porter Company, Inc., and Raymark Industries, Inc., who have not appealed, because a case based on the same facts was pending in another court as of the date each plaintiff filed its Claims Court

action. The complaint of GAF Corporation, an amicus curiae here, was not dismissed because of an exception to section 1500 set out in *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 170 Ct.Cl. 389 (1965).

In the order accepting the suggestion for this rehearing in banc, 926 F.2d 1109, 1110 (Fed.Cir.1991), we directed the parties to address the following questions:

a) Whether the term "has pending" as used in 28 U.S.C. § 1500 (1988) can be properly construed to mean pending at the time the Claims Court first entertains and acts on a Government Motion to dismiss (or its equivalent), regardless of when the Claims Court suit was actually filed; or whether the term "has pending" is properly construed to mean pending at the time when the Claims Court suit was filed;

b) Whether the case of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 170 Ct.Cl. 389 (1965), *cert. denied*, 382 U.S. 976, 86 S.Ct. 545, 15 L.Ed.2d 468 (1966) should be overruled;

c) Whether a petition for writ of *certiorari* is a "suit or process against the United States" as that phrase is used in § 1500;

d) Whether the rule announced in *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed.Cir.1988), *cert. denied*, 489 U.S. 1066, 109 S.Ct. 1342, 103 L.Ed.2d 811 (1989), for determining what is a claim under § 1500 should be reconsidered, and if so, what should be the proper rule.

Discussion

I.

The statutory history is fairly straightforward. During the Civil War, Congress passed the Captured and Abandoned Property Act of 1863, ch. 120, 12 Stat. 820, which allowed property in the Confederate states to be seized and used by the government for war purposes. If the property was not so used, it was sold and the proceeds deposited in the Treasury. *Id.* ch. 120, § 2, 12 Stat. 820. Claimants to the property could recover any proceeds from its sale if they filed in the Court of Claims, proved ownership, and proved by a preponderance of the evidence that they had not aided or provided comfort to the rebellion. *Id.* § 3, 12 Stat. 820.

Most of the claims were for cotton seized during the war. *See, e.g., Whiteside v. United States*, 93 U.S. 247, 23 L.Ed. 882 (1876). These so-called "cotton claimants" had a hard time proving that they had not aided the confederacy and therefore their chances for recovering the proceeds from the sale of their cotton were slim. To better their chances, they filed suit against federal officers in the state or federal district courts, as well as against the United States in the Court of Claims. In 1868, Congress sought to put an end to this practice by enacting the predecessor to section 1500:

Sec. 8. And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

Act of June 25, 1868, § 8, 15 Stat. 75, 77. On the floor of the Senate, the sponsor, Sen. Edmunds of Vermont, read the proposed bill¹ and then added:

The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

81 Cong.Globe, 40th Cong., 2d Sess. 2769 (1868). From this, the only legislative history, we see that the statute was intended to force plaintiffs to choose between pursuing their claims in the Court of Claims or in another court, "[t]he object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts." Thus, the claimants would not be able to "put the Government to the expense of beating them once in a court of law" and then try the question again in the Court of Claims. The statute also ameliorated the consequences of the unavailability of the defense of *res judicata* from cases against a federal officer in cases against the government itself, and vice versa.

¹ The text of the proposed bill, as read by Senator Edmunds on the floor of the Senate, is as follows:

Sec. 8. And be it further enacted, That no person shall file or prosecute any claim or suit in the Court of Claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending, *or shall commence*

(Footnote continued)

Section 8 was thereafter incorporated into the Revised Statutes of 1874. The few changes made to it then were not intended to alter its meaning in any way. 2 Cong. Rec. 129 (daily ed. Dec. 10, 1873) (statement of Rep. Butler). Section 8 was renumbered as section 1067 and provided:

Sec. 1067. No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

Revised Statutes of the United States, Title 13, § 1067, ch. 21, 18 Stat. 197 (1874). After the turn of the century, section 1067 was adopted without change as section 154 of the Judicial Code of 1911. Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1135, 1138 (codified at 28 U.S.C. § 260 (1940)).

As part of the revision of the Judicial Code in 1948, Congress essentially reenacted section 154. The new statute read:

The Court of Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or

and have pending, any suit or process in any other court against any officer or person who, at the time of the cause *as above* alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

81 Cong.Globe, 40th Cong., 2d Sess. 2769 (1868) (emphasis added). The only changes between the statute as proposed and as enacted is the unexplained deletion and substitution of the underscored text.

his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Act of June 25, 1948, ch. 646, 62 Stat. 942 (codified at 28 U.S.C. § 1500 (1948)). Thus, three changes were made to the statute. First, the language "or in the Supreme Court on appeal therefrom" was deleted as "unnecessary." Reviser's Notes, 28 U.S.C. § 1500, p. 1862 (1948). Second, the phrase "against the United States" was added, making it clear that dual litigation against the United States, as well as against a federal officer, was barred. See *Matson Navigation Co. v. United States*, 284 U.S. 352, 52 S.Ct. 162, 76 L.Ed. 336 (1932). The third change was that the language "No person shall file or prosecute" was replaced by "The United States Court of Claims shall not have jurisdiction," confirming the jurisdictional bar against the Court of Claims earlier set out by the Supreme Court in *Ex Parte Skinner & Eddy Corp.*, 265 U.S. 86, 95, 44 S.Ct. 446, 448, 68 L.Ed. 912 (1924). Appropriately, the only note accompanying the new statute states that any changes were "in phraseology" only. Reviser's Notes, 28 U.S.C. § 1500, p. 1862 (1948). The most recent change to section 1500 in 1982 merely reflected the establishment of the Claims Court in place of the Court of Claims by substituting the former name for the latter. Federal Courts Improvement Act of 1982, Pub.L. No. 97-164, 96 Stat. 40.

II.

By comparison with the history of the statute, the attendant judicial development was erratic. In *Corona Coal Co. v. United States*, 263 U.S. 537, 540, 44 S.Ct. 156, 156, 68 L.Ed. 431 (1924), the appellants complained that they were forced to file suit in a district court after they appealed to the Supreme Court from the Court of Claims or else their district court action would have

become time barred. Therefore, they argued, their actions were not "within the spirit of § 154 properly construed."² The Court responded that "the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases." *Id.* It dismissed the appeal.

In *British American Tobacco Co., Ltd. v. United States*, 89 Ct.Cl. 438 (1939), the Court of Claims declined two arguments now urged by appellants, which we address more fully below. First, the court rejected the notion that the word "claim" referred only to the legal theory on which a case is brought as opposed to the subject matter of the suit. *Id.* at 440. So, even though a district court action may sound in tort and the one in the Court of Claims may sound in contract, if they are based on the same operative facts, they are the same claim. *Id.* Second, it was irrelevant that a district court action pending when plaintiff filed suit in the Court of Claims was dismissed before the Court of Claims ruled on the motion to dismiss; "there is no merit in the contention now made by plaintiff that this court has jurisdiction and that plaintiff is now entitled to prosecute the claim presented by the petition in this court for the reason that the suit in the District Court has been dismissed and is not now pending." *Id.* at 441.

When first presented the question, the Court of Claims also held that under section 1500 actions filed in other courts *after* Court of Claims petitions were filed divested it of jurisdiction. In *Maguire Industries, Inc. v. United States*, 86 F.Supp. 905, 114 Ct.Cl. 687 (1949), it held that it had no jurisdiction where subsequent to filing a petition in the Court of Claims, plaintiff appealed a Tax Court decision to the court of appeals. Likewise,

² As discussed, section 154 is the predecessor of section 1500 and included appeals to the Supreme Court. Therefore, the effect on jurisdiction over cases pending in the Court of Claims and appeals pending in the Supreme Court when an action in another court had been filed was the same.

Hobbs v. United States, 168 Ct.Cl. 646 (1964), held that there was no jurisdiction where the day after filing its Court of Claims petition, plaintiff filed an appeal of an administrative decision dealing with the same facts in a court of appeals.

The Court of Claims recognized that section 1500 was intended to protect the United States from having to defend two lawsuits over the same matter simultaneously. *Wessel, Duval & Co. v. United States*, 124 F.Supp. 636, 637, 129 Ct.Cl. 464 (1954); *Frantz Equipment Co. v. United States*, 98 F.Supp. 579, 580, 120 Ct.Cl. 312 (1951). Relying on the explicit language of section 1500, it held that its jurisdiction over a case could not be dependent on whether or not a district court had jurisdiction, even if the statute of limitations may have run in the Court of Claims. *Frantz*, 98 F.Supp. at 580. And because section 1500 is purely jurisdictional, there is no basis "for finding saving exceptions unless they are made explicit." *Wessel, Duval & Co.*, 124 F.Supp. at 638 (quoting *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390, 73 S.Ct. 381, 383-84, 97 L.Ed. 422 (1953)).

Notwithstanding all this, in *Casman v. United States*, 135 Ct.Cl. 647 (1956), the Court of Claims found an exception to section 1500's clear mandate. It sustained jurisdiction over a former government employee's petition for back pay even though a suit for restoration to duty was pending in a district court. The court rationalized that the types of relief sought in the two courts were "entirely different" and that therefore section 1500 was inapplicable. *Id.* at 650.

In *Tecon*, 343 F.2d 943, the Court of Claims again succumbed to revision of section 1500 and held that a complaint filed in district court *after* a petition is filed in the Court of Claims did not defeat jurisdiction. The court tried to justify this by stating that "[f]or the most part" its earlier precedent involved "situations where suit was filed in another court prior to, or simultaneous with, the filing of the petition in this court." *Id.* at 950 (footnotes omitted). To the contrary, however, as we have seen, in *Hobbs*, the other suit was filed one day *after* the Court

of Claims petition. In *Maguire Industries*, cited as an example of a case in which the filing in the other court was *before* the Court of Claims petition, the event which ousted the Court of Claims of jurisdiction under section 1500 was the appeal of a Tax Court decision *subsequent* to the filing of the Court of Claims petition.

The facts underlying *Tecon* probably explain the court's desire to retain jurisdiction. Taxpayers sued in the Court of Claims for a refund of federal income taxes and civil fraud penalties. After much discovery, several pretrial conferences, and several trial postponements, plaintiffs filed the same claims in a district court and then moved the Court of Claims to dismiss its case under section 1500. An exasperated Court of Claims retained jurisdiction so it could dismiss the case with prejudice for failure to prosecute. We suspect this abuse of process and vexatious litigation would have been appropriately punished by the district court if this breach of jurisdictional jurisprudence had not intervened. We are quite certain that a district court would not hesitate to invoke Federal Rule of Civil Procedure 11 if faced with this kind of conduct today. See also 28 U.S.C. § 1927 (1988).

In *Brown v. United States*, 358 F.2d 1002, 1003, 175 Ct.Cl. 343 (1966), plaintiffs, a widow and surviving children, claimed their rice acreage allotments were so reduced as to amount to a governmental taking without compensation. They also filed their complaint in a district court. The government successfully moved for dismissal pursuant to section 1500, but when the district court dismissed the plaintiff's case for lack of jurisdiction, the Court of Claims reinstated its case, because "[i]n this situation, we do not believe that 28 U.S.C. § 1500 requires us to deprive plaintiffs of the only forum they have in which to test their demand for just compensation." *Id.* 358 F.2d at 1004.

Without discussing *Brown*, the Court of Claims crafted another exception to section 1500 in *Hossein v. United States*, 218 Ct.Cl. 727 (1978). There, the plaintiff filed a three count complaint in the Court of Claims and contemporaneously filed suit in a federal district court on the same claim. Because

count II alleged negligence and count III requested specific performance, the Court of Claims dismissed them. But because count I could be read to allege a contract implied in fact, the court retained jurisdiction but stayed consideration of the count "for reasons of comity and avoidance of piecemeal litigation," until the federal district court ruled. *Id.* at 729.

Recently, we revisited section 1500 in *Johns-Manville Corp. v. United States*, 855 F.2d 1556, and held that for the purposes of section 1500, two lawsuits involve the same "claim" if they are based on the same operative facts. After discussing the meaning of section 1500, we responded to Johns-Manville's arguments that our holding was unfair: "[p]rinciples of equity do not support finding jurisdiction exists. A court may not in any case, even in the interest of justice, extend its jurisdiction where none exists." *Id.* at 1565. We also held that a prior-filed, but stayed, district court action is "pending" within the contemplation of section 1500. *Id.* at 1567. But *Boston Five Cents Savings Bank, FSB v. United States*, 864 F.2d 137, 139 (Fed.Cir.1988), heavily depended on the *Casman* and *Hosseini* exceptions when it held that because a declaratory judgment was sought in the district court and monetary damages in the Claims Court, both suits could be maintained even if based on the same operative facts.

III.

As can now be seen, section 1500 is rife with judicially created exceptions and rationalizations to the point that it no longer serves its purposes: to force an election of forum and to prevent simultaneous dual litigation against the government. It is a rare plaintiff who could not find an exception to his liking if he tried hard enough. Appellants tell us this has come about because of the perceived harshness of the statute, but we see no harm in requiring a party to carefully assess his claims before filing and choose the forum best suited to the merits of the claims and the applicable statutes of limitations. Indeed, a prohibition against suing the government simultaneously in multiple forums, and the likely inability to sue the government twice successively, are even more salutary in this day of excessive litigation than

they were back in the Civil War era whence section 1500 comes. Nor is stare decisis a reason not to revisit the jurisprudence encumbering this statute. It is now so riddled with unsupportable loopholes that it has lost its predictability and people cannot rely on it to order their affairs.

[1-3] Therefore, we hold today that in accordance with the words, meaning, and intent of section 1500: 1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on; 2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction, regardless of when the court memorializes the fact by order of dismissal; and 3) if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata and available defenses apply.

A.

We reach our interpretation of the law by considering and rejecting appellants' arguments that we continue the charade that section 1500 has become and engraft another exception on it. We are told that suits against the United States for more than \$1,000,000,000 incurred by appellants because of asbestos exposure by workers allegedly following federal contract requirements depend on these arguments. We cannot fault appellants' attempt to test the government's liability. But we cannot countenance the method.

Appellants argue first that section 1500 only bars Claims Court jurisdiction when claimants have other cases pending on the date the Claims Court entertains a motion to dismiss. Thus, cases filed in other courts before the Claims Court complaint, but dismissed for whatever reason before a motion to dismiss is acted on by the Claims Court would be irrelevant. We think such a scheme would not only contradict the meaning and purposes of section 1500 but would create an arbitrary and whimsical jurisdictional result. By the plain language of section 1500,

if the same claim is pending in another court when the plaintiff files his complaint in the Claims Court, there is no jurisdiction, period, even if the conflicting claim is no longer pending when a motion to dismiss is brought or considered by the court.

The construction urged by appellants was held to be meritless in *British Am. Tobacco Co. v. United States*, 89 Ct.Cl. at 441. Section 1500 states explicitly and unequivocally that the Claims Court "shall not have jurisdiction" over any claim with respect to which plaintiffs have suits pending in other courts. There is nothing in section 1500 to suggest a free floating jurisdictional bar that attaches only when the government files a motion to dismiss or, worse, when the court gets around to acting on it. Jurisdiction cannot be bestowed by the parties. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702, 102 S.Ct. 2099, 2104, 72 L.Ed.2d 492 (1982). And it is the duty of a court to actively police its jurisdictional boundaries; the state of a trial court's docket or the diligence of the assigned judge has no role in determining the existence of jurisdiction.

As discussed above, the original purpose was to force an election between a suit in the Court of Claims and a suit in another court on essentially the same claim. To permit a plaintiff to maintain cases in both courts until the government moves to dismiss the Claims Court suit or until a judge addresses the motion would compel the government to defend two suits simultaneously, contrary to this recognized purpose of section 1500.

From the language of the original statute, "no person shall file or prosecute any claim . . . for or in respect to which he . . . has pending any suit or process in any other court," it is readily apparent that any suit *filed* in the Court of Claims when the same claim was pending in another court fell within the statutory bar and had to be dismissed, no matter when the jurisdictional objection was raised and regardless of intervening actions in the conflicting case. When Congress changed the statute in 1948 to read "the Court of Claims shall not have jurisdiction . . .," the meaning was not changed; the note observed that changes were in "phraseology" only. No changes in

substantive law may be presumed from the 1948 Revision of the Judicial Code "unless an intent to make such changes is clearly expressed." *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 227, 77 S.Ct. 787, 791, 1 L.Ed.2d 786 (1957).

It is fundamental that jurisdiction is established, if at all, at the time suit is filed. *Smith v. Sperling*, 354 U.S. 91, 93 n. 1, 77 S.Ct. 1112, 1114 n. 1, 1 L.Ed.2d 1205 (1957). We presume the drafters of section 1500 knew this; if they intended the interpretation urged by appellants, they would have manifested this by appropriate words.

All jurisdictional rules are absolute. The Supreme Court stressed this in implementing section 154 according to the plain meaning in *Corona Coal*, 263 U.S. at 540, 44 S.Ct. at 1157. But in *Brown v. United States*, 358 F.2d 1002, the Court of Claims sought to avoid the supposed harshness of that rule, at least for that case. It reasoned that "Section 1500 was not intended to compel claimants to elect, at their peril, between prosecuting their claim in [the Court of Claims] (with conceded jurisdiction, aside from Section 1500) and in another tribunal which is without jurisdiction," *id.* at 1005. In light of the plain meaning and purpose of the statute, we disagree. It may have seemed unfair "to deprive plaintiffs of the only forum they [had] in which to test their demand," *id.* at 1004, but that does not justify rewriting the statute. *Brown* is overruled.³ To the extent *Brown* can be read as a case brought in the wrong court, 28 U.S.C. § 1631 (1988) now permits a transfer to the court that has jurisdiction if the transferring court believes it to be in the interest of justice. But that would not have helped here because appellants were in courts with jurisdiction; their complaints based on the Federal Tort Claims Act and Little Tucker Act were dismissed

³ We also overrule cases like *Casman*, 135 Ct.Cl. 647, *Hossein*, 218 Ct.Cl. 727, and *Boston Five Cents*, 864 F.2d 137, which declined to dismiss complaints in the Claims Court when the same claim was the basis for a case pending in district court.

on the merits with prejudice. See, e.g., 581 F.Supp. at 968-80; 655 F.Supp. at 1171-76.

B.

Section 1500 states that the "Claims Court shall not have jurisdiction of any claim . . . in respect to which the plaintiff . . . has pending in any other court *any suit or process*." A case filed subsequent to a Claims Court complaint is clearly a "pending . . . suit or process." Thus, by the command that the Claims Court "shall not have jurisdiction," upon the occurrence of the triggering event, the filing of suit in another court, the Claims Court is automatically divested of jurisdiction. Congress wanted not to dictate the order in which a claimant files suits in the Claims Court and another court on the same claim, but to discourage him from doing so altogether. Otherwise the purpose of saving the government from defending the same claim in two courts at the same time would be defeated. Of course, it is axiomatic that once jurisdiction attaches, subsequent activities by the parties do not affect it. *Mollan v. Torrance*, 22 U.S. (Wheat) 537, 539, 6 L.Ed. 154 (1824). But the result here occurs by operation of law.

We are today undertaking a comprehensive effort to set out the proper interpretation of a jurisdictional statute, a matter that does not require a pointed dispute between parties. Courts are obliged to resolve jurisdictional questions on their own even if parties do not raise them. In the course of this interpretative effort, if prior cases are seen as inconsistent, it is incumbent on the court to acknowledge their nonviability. For that reason we revisit *Tecon*, 343 F.2d 943, an aberrational case which stands astride the path to a proper interpretation of section 1500 as it pertains to a post Claims Court filing in another court.

Our role comports with cases from both the Supreme Court and the Court of Claims prior to, but ignored by, *Tecon*, as laid out above. *Corona Coal*, 263 U.S. 537, 44 S.Ct. 156, dismissed an appeal from the Court of Claims to the Supreme Court under section 154 because the plaintiff had filed suit in district court

on the same claim after the appeal was lodged. *Hobbs*, 168 Ct.Cl. 646, and *Maguire Industries*, 86 F.Supp. 905, are to the same effect.

Tecon erroneously relied on the deletion of the words "or shall commence and have pending" from the original bill proposed by Sen. Edmunds as section 8 of the Act of June 25, 1868. 343 F.2d at 947. Aside from the fact that there is no indication why section 8, as enacted, did not include this language, its deletion did not change the plain meaning of the statute; it was superfluous. Since pertinent changes to the statute that came later were in phraseology only, its meaning from the beginning is that the Claims Court loses jurisdiction when the same claim is filed in another court. *Tecon* is overruled.

IV.

That the word "claim" does not refer to a legal theory, contrary to appellants' argument, but to a set of underlying facts, comports with the language and history of section 1500. As we discussed in *Johns-Manville*, 855 F.2d at 1561, the cotton claimants were not able to bring their lawsuits in the Court of Claims and the other courts on the same theory.* Therefore, to accept appellants' argument would be to interpret section 1500 in a way that would have rendered it ineffective against the very abuse it initially targeted. Courts strive to avoid nonsensical interpretations. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982).

Appellants base much of their argument against *Johns-Manville*, that we have given section 1500 "an unjustifiably broad interpretation," on the perceived unfairness of the concept that

* A cotton claimant would have had to bring his Court of Claims action against the United States under the Captured and Abandoned Property Act of 1863, ch. 120, § 3, 12 Stat. 820, while he would have had to bring his district or state court action against a federal agent under a tort theory. *Johns-Manville*, 855 F.2d at 1561.

claims are the same when they involve the same operative facts. But once again, we cannot extend jurisdiction in the interest of equity. *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818, 108 S.Ct. 2166, 2178, 100 L.Ed.2d 811 (1988). Further, section 1500 states that appellants cannot have pending any Claims Court claims "for or in respect to which" they had claims pending in district courts. This precludes the argument that the facts must be precisely the same at all events. The question in *Johns-Manville* was whether the Tucker Act claim was "in respect to" the tort claim in the district court. We reaffirm that, correctly construed, section 1500 applies to all claims on whatever theories that "arise from the same operative facts." 855 F.2d at 1567. For example, in this case, all of appellants' claims are founded on or "arise from" personal injuries suffered by workers, even though the complaints allege various theories of recovery. A contrary conclusion would permit plaintiffs to evade the strictures of section 1500 by drafting complaints in separate suits based on minor differences in facts which, in reality, relate to the same dispute.

Indeed, the meaning of "claim" has never really been otherwise. As far back as 1939, the Court of Claims stated emphatically that the meaning of claim was not dependent on the legal theory proposed. *British Am. Tobacco Co. v. United States*, 89 Ct.Cl. at 440; see also *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 152 F.Supp. 236, 238, 138 Ct.Cl. 648 (1957). We decline to disturb either this precedent or *Johns-Manville*.

V.

[4] On June 1, 1989, when the Claims Court dismissed Eagle-Picher's complaint, a petition for writ of certiorari was pending in the Supreme Court pertaining to the dismissal of Eagle-Picher's Federal Tort Claims Act and Little Tucker Act suit in the Western District of Washington. *Lopez v. Johns-Manville*, 649 F.Supp. 149 (W.D.Wash.1986), *aff'd sub nom. Lopez v. A.C. & S., Inc.*, 858 F.2d 712 (Fed.Cir.1988), *cert.denied*, 491 U.S. 904, 109 S.Ct. 3185, 3186, 105 L.Ed.2d 694 (1989). Eagle-Picher

argues creatively to the contrary, but there is no question that a petition for writ of certiorari is a "pending . . . suit or process." 28 U.S.C. § 1500. Eagle-Picher says a petition for a writ of certiorari is merely a request to review cases from the court of appeals for error, it is not directed against the government. Nor is the case "pending" any longer because the lower court judgment is not stayed. But a certiorari petition to the Supreme Court is unarguably a process, if not a suit. And it is a process against the respondent, not the court of appeals. The government was the respondent in *Lopez*; the court of appeals stood indifferent to whether the petition was granted or denied. Finally, the absence of a stay is irrelevant, and does not change the character of the papers in the Supreme Court. Judgments of district courts are not stayed either, absent a motion, but that does not take them outside the scope of section 1500.

Our holding today that cases pending in other courts on the date of filing in the Claims Court divest that court of jurisdiction renders this question secondary, if not moot. Eagle-Picher had cases pending in other courts when it filed its Claims Court action; therefore that action was properly dismissed regardless of the petition for writ of certiorari. Nevertheless, having posed the question when ordering rehearing in banc, and because the matter is integral to the interpretation of a jurisdictional statute, as we discussed earlier, we are constrained to explain the role of a petition for certiorari in the context of this scheme.

VI.

[5] The Claims Court dismissed UNR's and Eagle-Picher's suits because both had pending district court cases against the government when they filed their Claims Court complaints. Because we reaffirm our view in *Johns-Manville* that claims are the same if they involve the same underlying facts, and because we have no dispute with the Claims Court's factual analysis of UNR's and Eagle-Picher's claims, 17 Cl.Ct. at 156, we affirm the dismissal of their complaints.

Keene says that even under *Johns-Manville*, the facts underlying its first petition in the old Court of Claims (*Keene I*) are not the same as the facts at issue in *Miller*, and its voluntary dismissal in *Miller* renders it a nullity. We think not. Keene's voluntary dismissal of the third party complaint is irrelevant because dismissal did not occur until after Keene filed its Court of Claims petition. The complaint was pending when *Keene I* was filed; therefore, the Claims Court has no jurisdiction. And we have no quarrel with the Claims Court determination that the underlying facts in *Miller* and *Keene I* are the same.

Keene also asserts that because *Keene II* requests relief different from its indemnification suit in the Southern District of New York, the Claims Court has jurisdiction. But this relies on the exception *Casman* opened up, and as of today, *Casman* and its progeny are no longer valid.

Finally, appellants ask that any decision on section 1500 inconsistent with their arguments be applied prospectively. But we are not at liberty to so limit our judgment. As early as 1807, Chief Justice Marshall said that "courts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93, 2 L.Ed. 554 (1807). Later, the Supreme Court admonished that "[c]ourts created by statute can have no jurisdiction but such as the statute confers." *Sheldon v. Sill*, 49 U.S. (8 How.) 441, 449, 12 L.Ed. 1147 (1850). And only recently, the Court cautioned that courts have no authority to reach the merits of a case in the absence of subject matter jurisdiction, even if they perceive it to be "in the interest of justice" to do so. *Christianson*, 486 U.S. at 818, 108 S.Ct. at 2178.

The Claims Court is absolutely without authority to decide any case which does not fit within its statutory grant of jurisdiction. Because we decide today that section 1500 precludes the Claims Court from exercising jurisdiction over these claims, we cannot direct it nevertheless to address the merits, even if the parties otherwise may incur hardship. "A court lacks discretion

to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379, 101 S.Ct. 669, 676, 66 L.Ed.2d 571 (1981). We are not unaware of the detriment parties might suffer after spending years litigating, only to find that the chosen court lacks jurisdiction. But we must abide by the "age-old rule that a court may not in any case, even in the interest of justice, extend its jurisdiction where none exists." *Christianson*, 486 U.S. at 818, 108 S.Ct. at 2178; see also *Johns-Manville*, 855 F.2d at 1565. We have no discretion to apply this judgment only prospectively.

Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 458 U.S. 50, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982), is not to the contrary. The Supreme Court there declined to retroactively apply the effect of its declaration that the Bankruptcy Act of 1978 was unconstitutional because this "would surely visit substantial injustice and hardship on those litigants who relied upon the Act's vesting of jurisdiction in the bankruptcy courts," and this decision was "an unprecedented question of interpretation of Art. III." *Id.* at 88, 102 S.Ct. at 2880. To do otherwise would have created chaos in the bankruptcy system and the Court expressly gave Congress a time certain by which to fix the constitutional problem. But in keeping with the teaching of *Firestone Tire* and *Christianson*, it did not permit the bankruptcy judges to continue to perform the forbidden duties even in the case before it. *Id.* at 87 n. 40, 102 S.Ct. at 2880 n. 40. That is to say, it prospectively declared the Act unconstitutional and the courts without jurisdiction, but it did not nevertheless allow the case to be decided on the merits, as we are urged to do here. And there is a significant difference between the reliance on a clear congressional grant of jurisdiction in *Northern Pipeline*, and the activities of these appellants who were trying to circumvent section 1500.

⁵ Indeed, only a plurality of the Court concluded the Act was unconstitutional in all its ramifications. A majority was reached only for the unconstitutionality of the exercise of Article III powers over traditional actions at common law by Article I judges. See 458 U.S. at 91, 102 S.Ct. at 2882 (Rehnquist, J., concurring in judgment).

Conclusion

Accordingly, the judgment of the Claims Court is affirmed.

AFFIRMED.

NIES, Chief Judge, additional views.

I join the majority opinion holding that section 1500 precludes the U.S. Claims Court from exercising jurisdiction over any claim which is pending in another court. I write here because of my view of other precedent, not discussed by the majority, facing those who seek (1) relief obtainable only outside the Claims Court, and (2) relief obtainable only within the Claims Court. If those litigants fail to complete litigation in one forum prior to the running of the statute of limitations in the other, they will be confronted with the decision of Court of Claims in *Ball v. United States*, 137 F.Supp. 740 (1956), which held that the pendency of a suit in district court could not toll the running of the statute of limitations on the cause of action in the Court of Claims. However, the Court of Claims left open the question whether the *Ball* plaintiff was foreclosed from pursuing both actions concurrently. A few months later, the Court of Claims in *Casman v. United States*, 135 Ct.Cl. 647 (1956) created the exception to section 1500, overturned today, that suit in the Court of Claims was permitted where the relief sought in a district court was equitable in nature and could not be obtained in the Court of Claims.

While technically *Ball* preceded *Casman*, I believe the two cases are interdependent. Thus, in light of today's ruling on *Casman*, I believe the precedent of *Ball* is seriously eroded. Moreover, *Ball* would require revisiting in any event because of the recent decision of the Supreme Court, *Irwin v. Veterans Admn.*, ___ U.S. ___, 111 S.Ct. 453, 112 L.Ed.2d 435 (1990) holding that equitable tolling may be available in suits against the United States. Where a party has possibly two claims for relief and is barred from asserting them concurrently by section 1500, I do not believe the period allowed for bringing the

additional or alternative claim should arbitrarily be cut off or even shortened. Section 1500 does not require such forfeiture. Some cases may be dealt with by the transfer statute, 28 U.S.C. § 1631 (1988). However, as the majority opinion indicates, it would not apply where the merits are litigated. In any event, the option of tolling the statute of limitations should be available to the Claims Court despite the *Ball* decision.

PLAGER, Circuit Judge, dissenting.

I respectfully dissent. I find myself in disagreement with the court on three issues which cause me to come to a different conclusion. They are: (1) the significance of the various amendments to the act, and whether the act is 'plain' on its face or, as I believe, in need of interpretation; (2) the exact purpose of the original act, as Senator Edmunds described it, since I believe that bears importantly on how the act should be interpreted; and (3) whether this is a typical jurisdiction-granting act, with all the rigidity in application that that characterization implies.

In sum, it seems to me that the court reads the governing statute, § 1500, not as it is now written but as it was before the 1948 amendments, and as the court wishes it were today. The court imports into the act a rigid application that is not supported either by the legislative history or the original purpose. I believe that the interests of justice and our responsibility to apply the law as Congress has enacted it require otherwise.

I.

The first of the rules derived by the court from "the words, meaning, and intent of section 1500" is that "if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on." Maj. at 1021. As the court explains, "[b]y the plain language of section 1500, if the same claim is pending in another court when the plaintiff files his complaint in the Claims Court, there is no jurisdiction, period . . ." Maj. at 1021 (emphasis added).

In fact the statute says no such thing. The original 1868 statute began with the phrase "... no person *shall file* or prosecute any claim ..." (emphasis added). However, in 1948 the statute was amended in several respects. One respect was to delete the *shall file or prosecute* language. The statute before us today states something quite different: "The Claims Court shall not have jurisdiction of any claim ... which the plaintiff ... *has pending* in any other court ..." (emphasis added). Different words have different meanings; the question for the court is not what the statute once meant, but what it means now.

In the original panel opinion in this case, 911 F.2d 654 (Fed.Cir.1990), the panel majority discussed at length the question of the possible consequences of this change, and in particular the problem of determining the *when* implicitly referred to by the *has pending* phrase. We discussed the possible constructions that could be placed on that phrase given the history of the act, and the subsequent history of its interpretation by this court and its predecessor.

The court today by its 'plain language' interpretation ignores the obvious ambiguities the revised language created, and would have us believe that the amendments never happened, in fact or in law. It summarily overrules our prior precedents which struggled – not always successfully – to make sense of the statute. The explanation the court gives for the change made in 1948, and for the summary dismissal of its possible significance, is that it is a change "in phraseology" (quoting the 1948 revisions). That is an undeniable fact, but hardly dispositive of the interpretation question. It is after all the phraseology of the statute that gives us its meaning. I regret that I am unable to see the meaning of the words with the same clarity that the majority does.

The plain meaning rule, when applicable, has important structural effect beyond its rhetorical value. Honestly applied, it tells a court what *not* to look at – legislative debates, committee reports, newspaper commentary and other 'aids' to policy development; the meaning of the law is what the words of the

statute say it is. In cases in which a plain meaning exists, it is hard to quarrel with that construct.

This, however, is not a plain-meaning case. Here we have neither plain meaning – the statute as now written simply does not address *when* an earlier-filed case must be pending to invoke a § 1500 bar¹ – nor clear evidence of what the Congress intended on this issue. Certainly nothing in the statute now speaks of the *time of filing* of the complaint.

The majority suggests we may not find in a change in the wording of a statute any change in the meaning "unless an intent to make such changes is clearly expressed," citing the Supreme Court's opinion in *Fourco Glass*. But it was the very decision in *Fourco Glass* that this court recently held was overturned by a subsequent amendment to the venue statute, even though there was a total absence of evidence of legislative intent to achieve that particular result. See *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed.Cir.1990), *cert. denied* ___ U.S. ___, 111 S.Ct. 1315, 113 L.Ed.2d 248 (1991) (a change in the general definitions applicable to venue applies to the specific provisions for venue in patent infringement suits).

The answer to the conundrum posed by § 1500, thus, must be found by ferreting out its underlying policy and applying it to the situation before us. The Supreme Court has recently stated: "It is a well-settled canon of statutory construction that, where the language does not dictate an answer to the problem before the Court, 'we must analyze the policies underlying the statutory provision to determine its proper scope.' " *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 831 n. 7, 103 S.Ct. 1587, 1592 n. 7, 75 L.Ed.2d 580 (1983) (quoting *Rose v. Lundy*, 455 U.S.

¹ In *Johns-Manville*, we determined that "the plain meaning of 'pending' includes cases which have been filed but stayed." 855 F.2d at 567. Unlike the present case, in *Johns-Manville* the earlier-filed action was *never not* pending, and so the plain meaning interpretation therein does not reach the question of "when" an action must be pending to invoke § 1500.

509, 517, 102 S.Ct. 1198, 1203, 71 L.Ed.2d 379 (1982)). The statement by Senator Edmunds, the sponsor of § 1500, explaining the purpose of the statute, is "an authoritative guide to the statute's construction." *Bowsher*, 460 U.S. at 832-33, 103 S.Ct. at 1593 (citing *North Haven Board of Education v. Bell*, 456 U.S. 512, 527, 102 S.Ct. 1912, 1921, 72 L.Ed.2d 299 (1982)).

The majority and I agree, in accord with Senator Edmunds' expressions, that the general purpose of § 1500 is to conserve the Government's limited resources. But Senator Edmunds in his statement in support of the bill made very clear the precise nature of the problem: there was a large class of persons who sued agents of the Government in suits around the country and then "after they put the Government to the expense of *beating them once in a court of law* they can turn around and try the whole question in the Court of Claims."² (Emphasis added.) And as we said in *Johns-Manville*, "[t]he remaining legislative history is devoid of any evidence indicating the legislature's intended purpose of section 1500." 855 F.2d at 1561.

We have then a statute which is less than clear on its face, and the purpose for which must be gleaned from a very limited legislative record. When there are alternative constructions of a statute, it is the court's duty "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *FBI v. Abramson*,

² See 81 Cong.Globe, 40th Cong., 2d Sess. 2769 (1868). Accord, *Connecticut Dept. of Children & Youth Serv. v. United States*, 16 Cl.Ct. 102, 104 (1989): "Section 1500 clearly precludes the Claims Court's exercise of jurisdiction over proceedings with similar claims against the United States that were filed previously and remain pending in other courts. The section was enacted over a century ago to avoid the maintenance of suits against the United States in the Court of Claims after a claimant failed to receive satisfaction from suit against the United States elsewhere. At that time a judgment in another court had no res judicata effect in a subsequent suit against the United States in the Court of Claims. [Citation omitted]. The legislative history and cases indicate that section 1500 was created for the benefit of the sovereign and was

(Footnote continued)

456 U.S. 615, 625 n.7, 102 S.Ct. 2054, 2061 n. 7, 72 L.Ed.2d 376 (1982) (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297, 77 S.Ct. 330, 338, 1 L.Ed.2d 331 (1957)).

An important purpose, then, of the act – and one that presumably remains important – is to conserve Government resources. In order to achieve this purpose, the Government contends that § 1500 is a *jurisdictional* statute – like the diversity jurisdiction statute – and that like other jurisdictional statutes, the jurisdictional determination must be made by looking to the existence or non-existence of jurisdiction at the time a complaint is filed. Appellants, on the other hand, argue that if there are no other suits pending at the time the Claims Court considers a § 1500 motion, then Claims Court jurisdiction is not barred; since the purpose of § 1500 is to relieve the United States from defending the same claims in two courts *at the same time*, that purpose would only be subverted if a claimant had another claim *presently* pending in another court, not *formerly* pending.

While the Government's theory has a bright-line advantage, it fails in two respects. First, the conclusion that § 1500 is jurisdictional in the usual sense does not withstand analysis. The purpose behind *jurisdictional* statutes, for example the diversity jurisdiction statute, 28 U.S.C. 1332 (1988), or for example the statute that authorizes this court to hear this appeal from the Claims Court, 28 U.S.C. § 1295 (a)(3) (1988), is to create jurisdiction in a federal court where none would otherwise exist, i.e. no subject matter jurisdiction.

The purpose behind § 1500, on the other hand, is to save the Government from having to defend the same suit in two different courts at the same time. Section 1500 *takes away*

intended to force an election when both forums could grant the same relief, arising from the same operable facts. *Johns-Manville v. United States*, 855 F.2d 1556, 1564 (Fed.Cir.1988). *The current purpose served by this section is to relieve the United States from defending the same case in two courts at the same time. Id.* at 1562; *Dwyer v. U.S.* 7 Cl.Ct. [565] at 567 [(1985)]." (Emphasis added.)

jurisdiction even though the subject matter of the suit may appropriately be before the Claims Court. Operationally these two statutes focus on different issues. The former says, 'ordinarily your subject matter cannot be here, but if you satisfy the requirements of this statute, then you may *go ahead and proceed* in federal court.' The latter says, 'though your subject matter may appropriately be here in the Claims Court, if you come within the proscriptions of this statute, then you *may no longer proceed here*.'

Second, the Government's theory fails because it too early cuts off the recourse of litigants who, either because of subject matter or other circumstances, may be found entitled to pursue their claims only in the Claims Court, and who would not otherwise violate the policy behind § 1500. The facts of the present case offer a good example. UNR had third-party complaints against the Government pending in federal district court. Unsure of whether the district court had jurisdiction, and facing a running of the statute of limitations, UNR filed the same claim in the Claims Court. More than two years before the Claims Court entertained and acted on the Government's § 1500 motion to dismiss, the district court dismissed UNR's third-party complaints for lack of jurisdiction.³ By the time the Claims Court entertained and acted on the Government's § 1500 motion, UNR had no earlier-filed suits pending and had yet to have its day in court. I believe the statute was not intended to operate to preclude UNR from having its day.

The Government warns that any interpretation of § 1500 that varies its focus from the time of filing will unduly burden the United States by forcing it to defend an earlier-filed district court complaint and a Claims Court complaint on the same basic claim at the same time, and would in effect give a plaintiff 'two bites at the apple.' The Government further warns that such

³ The majority opinion observes that appellants' complaints based on the Federal Tort Claims Act and Little Tucker Act were dismissed on the merits with prejudice; but the other counts in the complaints were dismissed for lack of subject matter jurisdiction.

interpretation will require the Claims Court to undertake a burdensome analysis to determine whether the earlier-filed suit is pending.

The rule I would favor, however, does not fuel these worries. Claimants are entitled to a day in court. That does not mean, however, that a claimant is entitled to tie up Government resources by forcing it to simultaneously defend itself in two courts. If an earlier-filed action is finally dismissed other than on the merits before the Claims Court entertains and acts on the jurisdictional question, then the Claims Court action will be the only suit pending and the plaintiff will have but one day in court.*

If at the time the Claims Court entertains and acts on the jurisdictional question the earlier-filed action is still pending, i.e. not finally dismissed, then § 1500 will bar jurisdiction. Plaintiff will then have to proceed with the earlier-filed action, or come back to the Claims Court, if a statute of repose does not prevent, should its district court action be dismissed. The determination that the Claims Court must make is straightforward. Under this rule it is not possible for a plaintiff to prosecute an action both in the Claims Court and in another court at the same time. This is what § 1500 precludes.

I would adhere then to the rule announced in the original panel opinion: when an earlier-filed district court case is finally dismissed before the Claims Court entertains and acts on a § 1500 motion to dismiss, § 1500 does not bar Claims Court jurisdiction even though the dismissal may have occurred after the filing of the Claims Court action. This is an alternative reading of an ambiguous statutory phrase, and produces a result that comports more nearly with the purpose of the original act and with the dictates of fairness.

* Obviously, if an earlier-filed suit is carried through to final adjudication on the merits and is thus no longer pending at the time the Claims Court considers § 1500 jurisdiction, the action would be subject to res judicata principles.

II.

The second rule the court announces today is that "if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction . . ." Maj. at 1021. While the first rule the court derived, discussed above, is at least arguably an interpretation that the statute supports, this rule is without any support in the language of the statute, and inconsistent with the majority's first rule.

The statute speaks only to whether the Claims Court has jurisdiction *when the same claim is pending in another court*; nothing whatever is said about a claim that is *not* pending at the time that 'pendingness' is tested. If the majority believes, as we are told, that 'pendingness' is tested at the time the complaint is filed in the Claims Court — that the 'jurisdictional' determination must be made at the time the complaint is filed — then it is at that point that jurisdiction attaches or not. Nowhere does the statute go on to say that jurisdiction, once attached, shall be divested.

Again, the original statute enacted in 1868 had such language — it proscribed both filing and *prosecuting* any claim, in the then-Court of Claims, when the same claim was pending in another court. But again, subsequent amendments to the statute removed that language; the statute no longer contains a proscription against *prosecuting* a claim. And again, the court reads the statute as it once was, and as it wishes it were today.

Furthermore, to reach this result the court implicitly concedes a point it earlier denies — 'jurisdiction' under § 1500 turns out not to be, as we are told, a one-time absolute determined at the moment of filing. The Claims Court can have jurisdiction under § 1500 — no claim having been filed in another court — and years later lose jurisdiction because of § 1500 — a claim having been filed at that later time in some other court. Under the second rule, then, 'jurisdiction' comes and goes, depending on subsequent events. While admittedly the concept of jurisdiction is

a slippery one, this ephemeral quality is unusual if not unique among jurisdictional statutes generally.⁵ In any event, the court's first and second rules stand on basically inconsistent grounds.

III.

The third rule announced by the court is that "if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata and available defenses apply." Maj. at 1021. This rule is consistent with the broad interpretation placed on the term 'claim' by our precedents, and today reaffirmed by the court. By itself, that interpretation and the rule here announced is not exceptional. When coupled with the application of 'has pending,' as in the first rule, so as to deprive litigants of their day in court, I do not believe that is what Congress intended by this legislation.

Chief Judge Nies would seem to agree. In her separate opinion she suggests that the solution is 'equitable tolling' of any applicable limitations statute that the Government might otherwise invoke. That is a creative alternative, and would accomplish much the same result as the rule I suggest — in effect, it would permit a litigant to learn whether its cause of action properly can be brought in a district court and, if not, still pursue a remedy against the Government in the Claims Court without fear of being barred by the delays inherent in getting that first decision.

⁵ This second rule is dictum, since none of the claims before the court in these cases arose out of this second fact pattern; they were all cases of filings first in the district courts, and only later in the Claims Court. When a factual issue is not presented to the court, there is no "case or controversy," U.S. Const. Art. III § 2. There is a question whether constitutional authority exists to bind future courts to this second rule. See *1B Moore's Federal Practice* ¶ 0.402[2], p. 40.

IV.

Congress presumably could have immunized the Federal Government from any liability for its asbestos-related activities; it did not. By general law, Congress has provided the citizens of this country an opportunity to fairly litigate their claims against the United States in the courts of the land. These plaintiffs, through no fault of their own, have not had that opportunity. I do not know whether the Government did anything that would make it liable under the law to these plaintiffs, but I do believe that § 1500 was not intended to deny them the opportunity to find out, and therefore I respectfully dissent.

APPENDIX B

UNR INDUSTRIES, INC., Unarco Industries, Inc.
and Eagle-Picher Industries, Inc.,
Plaintiffs-Appellants,

v.

The UNITED STATES,
Defendant-Appellee.

KEENE CORPORATION,
Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.

Nos. 89-1638, 89-1639 and 89-1648.

United States Court of Appeals,
Federal Circuit.

Jan. 24, 1991.

Appealed from U.S. Claims Court; Christine Cook Nette-
sheim, Judge.

Joe G. Hollingsworth, Spriggs & Hollingsworth, Washington,
D.C., argued, for plaintiffs-appellants in Nos. 89-1638, 89-1639.
With him on the brief, was William J. Spriggs. Also on the brief,
were Paul G. Gaston and Catherine R. Baumer. Paul C. Warnke,
Clifford & Warnke, Washington, D.C., was on the brief, for
plaintiff-appellant in No. 89-1648. With him on the brief, were
Harold D. Murray, Jr. and Philip H. Hecht. Also on the brief,
were John E. Kidd, Anderson Kill Olick & Oshinsky, P.C., New
York City and Lauren B. Homer, Anderson Kill Olick & Oshin-
sky, P.C., Washington, D.C.

David S. Fishback, Sr. Trial Counsel, Dept. of Justice,
Washington, D.C., argued, for defendant-appellee. With him
on the brief, were Stuart M. Gerson, Asst. Atty. Gen., J. Patrick
Glynn, Director, Harold J. Engel, Deputy Director and Douglas
C. Page, Trial Atty. Also Robert M. Loeb and Barbara C.

Biddle, Dept. of Justice, Washington, D.C., were on the Petition for Rehearing and Suggestion for Rehearing In Banc.

ORDER

On December 18, 1990, this court issued an order accepting the suggestion of Defendant-Appellee (Government) for rehearing in banc. We vacated the panel's judgment of July 30, 1990 and withdrew the accompanying opinion. The order further stated that "[a]dditional briefing and argument are under consideration." On January 4, 1991, Plaintiffs-Appellants filed a motion requesting opportunity for additional briefing and argument. On January 7, 1991, the Government filed a response, taking no position on the question of whether the court should entertain further briefing and argument.

In January 3, 1991, GAF Corporation moved for leave to file a brief as *Amicus Curiae*. In its January 7, 1991 response, the Government indicated it had no objection to the granting of GAF's motion so long as further briefing by the actual parties to the case is allowed.

After consideration of all the facts and circumstances, it is ORDERED that:

- 1) Plaintiffs-Appellants' motion for further briefing and argument is granted, subject to the terms of this Order.
- 2) GAF Corporation's motion for leave to file a brief as *Amicus Curiae* is granted.
- 3) Briefing and argument shall be addressed to the following issues (and may include related and subsidiary issues):
 - a) Whether the term "has pending" as used in 28 U.S.C. § 1500 (1988) can be properly construed to mean pending at the time the Claims Court first entertains and acts on a Government motion to dismiss (or its equivalent), regardless of when the Claims Court suit was actually filed; or whether the term "has pending" is properly construed to mean pending at the time when the Claims Court suit was filed;

b) Whether the case of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 170 Ct.Cl. 389 (1965) *cert. denied*, 382 U.S. 976, 86 S.Ct. 545, 15 L.Ed.2d 468 (1966) should be overruled;

c) Whether a petition for writ of *certiorari* is a "suit or process against the United States" as that phrase is used in § 1500;

d) Whether the rule announced in *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed.Cir.1988), *cert. denied*, 489 U.S. 1066, 109 S.Ct. 1342, 103 L.Ed.2d 811 (1989), for determining what is a claim under § 1500 should be reconsidered, and if so, what should be the proper rule.

4) Briefing shall be accomplished in accordance with the following schedule:

a) Plaintiffs-Appellants shall serve and file their initial rehearing brief within 40 days of the date of this ORDER;

b) Defendant-Appellee shall serve and file its initial rehearing brief within 30 days after service of the brief of the Plaintiffs-Appellants;

c) Plaintiffs-Appellants may serve and file a reply brief within 14 days after service of the brief of the Defendant-Appellee, but a reply brief must be filed at least 3 days before oral argument. Fed.Cir.R. 31 Practice Note shall apply.

d) GAF Corporation may serve and file a brief as *Amicus Curiae* in accordance with Fed.R.App.P. 29.

APPENDIX C

**UNR INDUSTRIES, INC., Unarco Industries,
Inc. and Eagle-Picher Industries, Inc.,
Plaintiffs-Appellants.**

v.

**The UNITED STATES,
Defendant-Appellee.**

**KEENE CORPORATION,
Plaintiff-Appellant.**

v.

UNITED STATES, Defendant-Appellee.

Nos. 89-1638, 89-1639 and 89-1648.

**United States Court of Appeals,
Federal Circuit.**

Dec. 18, 1990.

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc be, and the same hereby is, accepted. The judgment entered on July 30, 1990, 911 F.2d 654, is **VACATED**, and the accompanying opinion is withdrawn. Additional briefing and argument are under consideration.

APPENDIX D

UNR INDUSTRIES, INC., Unarco Industries, Inc. and Eagle-
Picher Industries, Inc., Plaintiffs-Appellants,

v.

The UNITED STATES,
Defendant-Appellee.

KEENE CORPORATION,
Plaintiff-Appellant,

v.

UNITED STATES, Defendant-Appellee.
Nos. 89-1638, 89-1639 and 89-1648.

United States Court of Appeals,
Federal Circuit.

July 30, 1990.

Joe G. Hollingsworth, Spriggs & Hollingsworth, Washington, D.C., argued, for plaintiffs-appellants in nos. 89-1638, 89-1639. With him on the brief was William J. Spriggs, Washington, D.C. Also on the brief were Paul G. Gaston and Catherine R. Baumer, Washington, D.C. Paul C. Warnke, Clifford & Warnke, Washington, D.C., was on the brief, for plaintiff-appellant in no. 89-1648. With him on the brief were Harold D. Murray, Jr. and Philip H. Hecht, Washington, D.C. Also on the brief were John E. Kidd, Anderson Kill Olick & Oshinsky, P.C. New York City, and Lauren B. Homer, Anderson Kill Olick & Oshinsky, P.C., Washington, D.C.

David S. Fishback, Sr. Trial Counsel, Dept. of Justice, Washington, D.C. argued, for defendant-appellee. With him on the brief were Stuart M. Gerson, Asst. Atty. Gen., J. Patrick Glynn, Director, Harold J. Engel, Deputy Director and Douglas C. Page, Trial Atty., Washington, D.C.

Before RICH, MAYER and PLAGER, Circuit Judges.

PLAGER, Circuit Judge.

This appeal is another chapter in the long-fought battle to determine responsibility for injuries sustained over the years by individuals working with asbestos. In these particular cases, plaintiff companies seek indemnification from the United States Government for the companies' liabilities to shipyard workers for injuries caused by exposure to asbestos. Before us is an appeal from an order of the United States Claims Court (Nettesheim, J.) entered June 1, 1989, and reported as *Keene Corp. v. United States*, 17 Cl.Ct. 146 (1989). The United States moved in the trial court to dismiss eight suits¹ brought by Keene Corporation, Eagle-Picher Industries, UNR Industries, Fibreboard Corporation, H.K. Porter Company, Inc., Raymark Industries, Inc. and GAF Corporation.² The trial court granted the motion as to all plaintiffs except GAF Corporation.³ Keene Corporation (Keene), Eagle-Picher Industries (E-P), and UNR Industries (UNR) all appealed pursuant to 28 U.S.C. § 1295(a)(3) (1988). E-P and UNR appealed jointly, and their appeal was consolidated with Keene's appeal for purposes of oral argument.*

The trial judge's decision was based on her reading of a statute, 28 U.S.C. § 1500, that pertains to the Claims Court's jurisdiction. The judge believed the statute denied the court jurisdiction, and obligated her to grant the Government's motion to dismiss. We believe the statute does not so dictate, and for that reason we reverse and remand for further proceedings consistent with this opinion.

I.

Much of the background of the present case is detailed in the trial court's opinion, *Keene Corp., supra*, and need not be recited here. In short, the present appeals raise the question of the proper

¹ Nos. 579-79C, 585-81C, 170-83C, 16-84C, 514-84C, 515-85C, 12-88C and 287-83C.

² Keene Corporation had two actions pending in the Claims Court. The other plaintiffs each had one case pending.

³ *Keene Corp. v. United States*, 17 Cl.Ct. at 160.

* The Government filed a single brief in response to the Keene and UNR E-P briefs.

application of 28 U.S.C. § 1500 (1988) to each of these cases. Section 1500 was enacted in 1868, and was most recently before us in *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed.Cir.1988) (per curiam), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1342, 103 L.Ed.2d 811 (1989), *aff'g Keene Corp. v. United States* 12 Cl.Ct. 197 (1987). The statute deals with the jurisdiction of the Claims Court, and bars that court from hearing claims when, under the terms of the statute, those claims are pending in other courts:

The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States

In the *Johns-Manville* case two issues involving the interpretation of § 1500 were addressed. First, the Claims Court had applied the statute to bar the plaintiffs' suit on the grounds that there were pending district court cases raising the same claims. On appeal plaintiffs argued that since their third-party district court suits against the Government were based on different theories of relief than their direct action Claims Court suits, they were different "claims" and thus not subject to the § 1500 bar. This Court held otherwise (thereby affirming the Claims Court), concluding that the term "claim" is defined by the operative facts alleged, not the legal theories raised.

For example, the fact that one set of operative facts may create liability both in tort and contract does not mean that a recital of such facts states two separate and distinct "claims" as that term is used in § 1500. We explained that this construction of the term "claim" serves the underlying purpose of § 1500, which is "to prohibit the filing and prosecution of the same claim against the United States in two courts at the same time." *Johns-Manville* at 1562.

The second issue addressed by this Court is whether third-party complaint cases that are stayed in the district court are

"pending" within the terms of § 1500. We held, based on a plain meaning interpretation of the statute, that "'pending' includes cases which have been filed but stayed." *Johns-Manville* at 1567.

The case now before us raises a third issue regarding the meaning of § 1500. In the present action, on November 16, 1988, with the *Johns-Manville* case in hand, the Government moved for summary judgment against the seven parties involved at the trial level. The Government asserted that at the time of filing in the Claims Court, each plaintiff had one or more suits pending in another court. Proceedings on the Government's motion were stayed while the appellants in the *Johns-Manville* case sought certiorari in the Supreme Court. The Supreme Court declined further review. *Keene Corp. v. United States*, ___ U.S. ___, 109 S.Ct. 1342, 103 L.Ed.2d 811 (1989).

Thereafter, on June 1, 1989, the Claims Court granted the Government's summary judgment based on lack of jurisdiction. *Keene Corp. v. United States*, 17 Cl.Ct. 146. With the exception of GAF Corporation, the Claims Court determined that each plaintiff had an earlier-filed suit that involved the same claim, i.e. same operative facts, as that in the Claims Court action, and that those earlier-filed suits were "pending" at the time the Claims Court suit was filed.

Keene, UNR, and E-P appealed to this court, arguing that the phrase "has pending" does not mean pending at the time the Claims Court action is filed. They contend that § 1500 should not bar jurisdiction if the earlier-filed suit, though still pending at the time the Claims Court action is filed, is dismissed before the Claims Court entertains the § 1500 motion to dismiss. Keene further argues that in its case, the earlier-filed suit does not involve the same operative facts as its Claims Court suit and that, however, the issue of "has pending" is resolved, § 1500 thus does not bar Claims Court jurisdiction. In view of our disposition of the jurisdiction issue, we need not address this additional issue.

II.

A. Earlier-Filed Suits In The District Courts

1. UNR Industries

In re All Maine Asbestos Litigation, Master Asbestos Docket, filed July 21, 1982), is an omnibus consolidation of 225 suits brought by present or former shipyard workers or their representatives seeking recourse for injury due to exposure to asbestos manufactured or supplied by the many named defendants. UNR is one of those defendants. The defendant manufacturers and suppliers, in turn, filed third-party actions for contribution or indemnification against the United States. These third-party suits were initiated in two different complaints, Model Third-Party Complaint Against the United States of America "A" ("Model Third-Party Complaint A") and Model Third-Party Complaint Against the United States of America "B" ("Model Third-Party Complaint B"). *Keene Corp.*, 17 Cl.Ct. at 149-50.

Eventually, all of the claims of the Model Third-Party Complaints A and B were dismissed. While the claims within each Model Third-Party Complaint were not all dismissed at the same time, for purposes of this opinion it is sufficient to note that by March 12, 1987, all of the claims of the Model Third-Party Complaint A were dismissed, *In re All Maine Asbestos Litigation (BIW Cases)*, 655 F.Supp. 1169, 1171 (D.Me.1987),⁵ and that by July 16, 1986, all of the claims of the Model Third-Party Complaint B were dismissed.⁶ *In re All Main Asbestos Litigation (PNS Cases)*, Master Asbestos Docket (D.Me., July 16, 1986).⁷

⁵ The dismissals of the claims of the Model Third-Party Complaint A were affirmed on July 20, 1988 in *In re All Maine Asbestos Litigation (BIW Cases)*, 854 F.2d 1328 (Fed.Cir.1988).

⁶ UNR and E-P do not contest that their earlier-filed suits involve the same operative facts as their Claims Court suits.

⁷ UNR noted in its brief that it filed for bankruptcy shortly after the Model Complaint filings and successfully secured a stay of all proceedings in the third-party actions, and that the dismissals thus, technically, did not apply to it. However, this is of no import since UNR voluntarily dismissed all of its Model Complaint actions on October 20, 1988, which is after UNR filed its Claims Court action but before the Claims Court entertained the Government's motion to dismiss.

2. Eagle-Picher Industries

- a. *In re All Maine Asbestos Litigation*, Master Asbestos Docket (D.Me., filed July 21, 1982)

E-P's involvement in *In re All Maine Asbestos Litigation* is similar to that of UNR. Thus all of E-P's third-party complaints against the Government, filed on July 21, 1982, were dismissed no later than March 12, 1987. *Keene Corp.*, 17 Cl.Ct. at 149-50.

- b. *Albert Lopez, et al v. Eagle-Picher Industries, Inc. v. United States*, No. C-84-155M (W.D. Wash., filed Feb. 3, 1983)

On February 3, 1983, E-P filed in the District Court for the Western District of Washington ten third-party complaints against the United States seeking indemnification for its liabilities resulting from asbestos-related injuries that its employees allegedly sustained while employed at the Puget Sound Naval shipyard. The case *Albert Lopez, et al v. Eagle-Picher Industries, Inc. v. United States*, No. C-84-155M (W.D. Wash., filed Feb. 3, 1983) ("*Lopez*"), was treated as a test case; E-P's third-party complaint was dismissed on May 19, 1986 for failure to state a claim.^{*} *Lopez v. Johns Manville*, 649 F.Supp. 149 (W.D.Wash.1986). The remaining nine third-party complaints were dismissed on June 30, 1986. *Keene Corp.*, 17 Cl.Ct. at 152.

3. Keene Corporation

- a. *Miller v. Johns-Manville Bldg. Prod., et al*, No. 78-1283E (W.D.Pa., filed June 1, 1979)

In this action ("*Miller*"), the personal representative of the estate of a laborer allegedly injured in 1943 from asbestos exposure sought damages from nine asbestos suppliers, including Keene Building Products. Keene's insurance company, in turn, initiated a third-party action against the United States and Celotex Corporation seeking contribution or indemnification for any resulting liabilities. *Keene Corp.*, 17 Cl.Ct. at 153. For

^{*} The *Lopez* decision was affirmed *sub nom. Lopez v. A.C. & S., Inc.* 858 F.2d 712 (Fed.Cir.), *reh'g denied* (Nov. 21, 1988).

purposes of this opinion, it is accepted that this third-party complaint was dismissed on May 13, 1980.^{*}

- b. *Keene Corp. v. United States*, No. 80-CIV-0401 (GLG) (S.D.N.Y., filed Jan. 22, 1980)

This suit ("*Keene (SDNY)*") was a direct action by Keene against the Government seeking indemnification, contribution or apportionment for amounts that Keene spent or may spend in defending and settling thousands of asbestos-related personal injury actions. *Keene Corp.*, 17 Cl.Ct. at 154. The district court dismissed this suit on September 30, 1981 holding the pleadings inadequate to invoke Federal Tort Claims Act jurisdiction. *Keene Corp. v. United States*, No. 80-CIV-0401 (S.D.N.Y.), *aff'd*, 700 F.2d 836 (2d Cir.), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

B. Claims Court Suits

1. UNR Industries

On January 16, 1984, UNR filed a direct action in the Claims Court, *UNR Industries, Inc.*, No. 16-84C, seeking damages from the Government for breach of express and implied asbestos-related contracts. *Keene Corp.*, 17 Cl.Ct. at 150-51.

2. Eagle-Picher Industries

On March 25, 1983, E-P filed a direct action in the Claims Court, *Eagle-Picher Industries, Inc.*, No. 170-83C, charging that the Government is contractually liable to E-P for the costs that E-P incurred in litigating and settling claims for asbestos-caused injuries. *Keene Corp.*, 17 Cl.Ct. at 150.

^{*} Keene apparently contended before the trial court that it voluntarily dismissed its third-party complaint. The Claims Court, however, stated that "it is unclear whether the [district] court acted on Keene's motion voluntarily to dismiss its third-party complaint, [but Keene] accepts a dismissal date of May 13, 1980." *Keene Corp.*, 17 Cl.Ct. at 153.

3. Keene Corporation

a. *Keene I*

On December 21, 1979, Keene filed suit in the Court of Claims, *Keene Corp. v. United States*, No. 579-79C (amended petition filed May 1, 1981) ("*Keene I*"), charging the Government with breach of warranty in an asbestos-related contract. *Keene Corp.*, 17 Cl.Ct. at 153-54.

b. *Keene II*

On September 25, 1981, Keene filed a second suit in the Court of Claims, *Keene Corp. v. United States*, No. 585-81C ("*Keene II*"), alleging that the Government violated its fifth amendment rights by recouping from injured workers the payments that the Government made to those injured workers under the Federal Employees' Compensation Act ("FECA"). Keene argued that since it had paid compensation to the injured workers either through settlement agreements or because of judgments in favor of them, the recoupment by the Government of amounts that it has paid to injured workers under FECA is an unconstitutional taking of Keene's property without just compensation, because the injuries to the workers were caused by the Government's actions. Keene alleged that this taking further had the effect of increasing the amounts of judgments and settlements that Keene was required to pay and impaired its contract rights. *Keene Corp.*, 17 Cl.Ct. 154-55.

III.

The central question in this appeal is the meaning of § 1500; specifically, since the statute bars Claims Court jurisdiction when there is a "pending" claim in another court, the issue is, pending *when*? In the art of statutory construction, there are as many formulations of how to do it as there are those doing it. The Supreme Court devotes considerable print to this¹⁰; the law

¹⁰ See, e.g., *Dole v. United Steelworkers of Am.*, ___ U.S. ___, 110 S.Ct. 929, 108 L.Ed.2d 23 (1990) (White, J., and Rehnquist, C.J., dissenting); *Sullivan v. Everhart*, ___ U.S. ___, 110 S.Ct. 960, 108 L.Ed.2d 72 (1990) (Stevens, Brennan, Marshall and Kennedy, J.J., dissenting); *Blanchard v. Bergeron*, 489

(Footnote continued)

review commentators have made this one of the hot topics in current legal learning.¹¹

A reading of some of the literature would seem to suggest that there was a time when the courts, in the exercise of their independent judgment, treated a statute as Vladimir Ashkenazy plays Tchaikovsky – a vehicle for expressing one's own creativity. However that may be, today there is widespread agreement that the courts have a responsibility, perhaps a constitutional duty, to implement the will of the Congress as expressed in the enacted legislation. Toward that end, courts have moved away from the traditional recitation of constructional rules – rules that lend themselves to post-hoc rationalization – and toward structural constraints on judicial readings.

[1] The point of beginning, then, is the statute. We first look to the statute for any express definitions of the key term or terms, and if none are found, then to see whether the terms can fairly be said to have a plain, non-ambiguous, meaning. The key phrase in our case is "has pending." A reading of § 1500 reveals that the statute offers no express definition of the phrase. As to the plain meaning of the term "pending," *Black's Law Dictionary* 1021 (5th Ed.1979) defines it as "[b]egun, but not yet completed; during; before the conclusion of" *Webster's Third New International Dictionary* (1986) defines "pending" as "not yet decided; in continuance; in suspense...." These definition support a conclusion that if a case is finally dismissed, either voluntarily or for lack of jurisdiction, prior to the relevant time for determining "pendingness," it is no longer "pending." That is,

U.S. 87, 109 S.Ct. 939, 103 L.Ed.2d 67 (1989) (Scalia, J., concurring in part and concurring in the judgment); *Thompson v. Thompson*, 484 U.S. 174, 108 S.Ct. 513, 98 L.Ed.2d 512 (1988) (Scalia, J., concurring).

¹¹ See, e.g., Eskridge & Frickey, *Statutory Interpretation as Practical Reasoning*, 42 Stan.L.Rev. 321 (1990); Farber, *Statutory Interpretation and Legislative Supremacy*, 78 Geo. L.J. 281 (1989); Posner, *Legislation and Its Interpretation: A Printer*, 68 Neb.L.Rev. 432 (1989); Popkin, *The Collaborative Model of Statutory Interpretation*, 61 S.Cal.L.Rev. 541 (1988); Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 U.Pitt.L.Rev. 691 (1987).

a finally dismissed action is "complete" or "concluded" from the perspective of the dismissing court. This plain meaning of the term "pending" does not, however, answer the question, *when* do we decide "pendingness"—when must a claim be pending to invoke the jurisdictional bar of § 1500. Regrettably, the legislative history of § 1500 fails to shed much light on this issue.

Section 1500 is a relatively ancient statute, and the legislative history concerning it is limited. As originally enacted in 1868, what is now 28 U.S.C. § 1500 read:

Sec. 8. *And be it further enacted* (italics in original), That no person *shall file* or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

Act of June 25, 1868, 15 Stat. 77 (emphasis added). The language in this original version of the statute is plain concerning our issue: the relevant time for determining the existence of a § 1500 bar is at the time the Claims Court suit is filed or prosecuted.

In 1868, an adjudication of a district court claim against an agent or officer of the United States had no res judicata effect on a judgment in a subsequent Court of Claims suit against the United States itself based on the same operative facts. See Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 576-78 (1967) (citing *Matson Nav. Co. v. United States*, 284 U.S. 352, 52 S.Ct. 162, 76 L.Ed. 336 (1932)).

Senator Edmunds, the author of the bill that became Section 8 of the Act of June 25, 1868, explained:

The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits *that are now pending*, scattered over the country here and there, and *who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims*. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868) (emphasis added). Thus, concerning sequential suits on the same operative facts in different courts against different plaintiffs, § 1500 was the means for achieving the same result as that provided by the doctrine of res judicata.

Senator Edmunds' statement that "[t]he object [of § 1500] is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts" would seem to be aimed at claimants with actions being prosecuted at the same time in both the Court of Claims and the district courts. Despite the plain language of the original statutory text, this statement indicates that Senator Edmunds believed that, under the statute, jurisdiction for purposes of prosecuting a claim could be settled sometime *after* a Court of Claims suit was filed, that is, while both suits were pending. Alternatively, this statement could have been made merely in reference to the part of the original statute that afforded the litigants thirty days from passage of the act during which plaintiffs could dismiss their other actions and preserve their Court of Claims jurisdiction. This explanation would make Senator Edmunds' statements consistent with the plain meaning of the statute.

To a large extent, Senator Edmunds' concerns have become moot. Today, § 1500 is rarely used as originally envisioned. Section 1500 was enacted to deal with a specific concern over a

rapid increase in the volume of complicated cotton claims cases, resulting from land seizures during the Civil War, involving suits both in the Court of Claims against the Government and in the district courts against the Secretary of the Treasury or his agents. Schwartz, 55 Geo. L.J. at 574-577. Without the force of § 1500, a full adjudication of the merits of the same claim, with differing results, could be realized in the two different courts. Today, while there may exist some situations in which a claimant may sue an officer or agent of the Government (in his/her official capacity) separate from the Government, there does not appear to exist the wholesale problem that the Government experienced in 1868.

Certainly, to the extent cases do arise where the same claim is otherwise allowably brought against an agent or officer of the Government and the Government itself, § 1500 may still be necessary to serve the function of a res judicata statute,¹² as originally envisioned. However, in the past 42 years¹³, the Government has invoked § 1500 in at most only three single instances to bar Claims Court jurisdiction where the same claim had previously been filed against an agent or officer of the Government in district court.¹⁴ In most of the cases arising under

¹² Schwartz calls for application of the rule of res judicata as between suits against agents or officers of the Government and the Government itself, noting that authority already exists providing such a rule in some instances and that policy otherwise favors it. See Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 599-601 (1967). Further, Schwartz notes that "[i]n modern times the legislature may terminate the common-law remedy against the government officer when a remedy against the United States is provided." *Id.* at 578 n. 26.

¹³ § 1500 has been in its present form since 1948. As will be discussed, in 1948 § 1500 was broadened to prohibit Claims Court jurisdiction when the Government itself is a defendant in the earlier-filed action. See *infra* text following note 18.

¹⁴ See *Hill v. United States*, 8 Cl.Ct. 382 (1985); *Brinker-Johnson Co. v. United States*, 144 Ct.Cl. 489 (1961); *National Cored Forgings Co. v. United States*, 132 F.Supp. 454 (1955). See also *Maguire Indus., Inc. v. United States*, 86 F.Supp. 905, 114 Ct.Cl. 687 (1949), *cert. denied*, 340 U.S. 809, 71 S.Ct. 36, 95 L.Ed. 595 (1950) (the earlier-filed action was in a tax court).

§ 1500, the Government uses § 1500 to bar Claims Court jurisdiction where the Government itself is the sole defendant in both the co-pending Claims Court and district court actions, and an agent or officer of the Government as such is not a named defendant. And it is out of these types of cases that the issue before us today arises — a type of case unknown to the framers of § 1500.¹⁵

[2,3] Yet, in actions against the Government in which the district courts and the Claims Court have concurrent jurisdiction,¹⁶ the doctrine of res judicata will protect the government from having to defend itself on the merits against a second claim brought by the same party sequentially on the same legal theories in both courts. Similarly, res judicata will protect the Government against second suits in those actions of which the district courts and the Claims Court have exclusive jurisdiction because of different legal theories or causes of action,¹⁷ but where the actions, though based on different legal theories, involve the same set of operative facts. Today, the intended res judicata effect of the original statute is necessary only in a quite limited set of circumstances, and thus § 1500 for these purposes has been rightly criticized as an anachronism.¹⁸

¹⁵ Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 580 (1967) ("Successive suits against the United States in different courts were not known to the framers of the statute, since in 1868 only the Court of Claims had jurisdiction of suits against the United States. The doctrine of sovereign immunity and the consent by Congress to suit as provided only in the Court of Claims acts constituted a prohibition of the jurisdiction over such suits in all other courts.")

¹⁶ See 28 U.S.C. § 1346(a) (1988).

¹⁷ See 28 U.S.C. §§ 1346(b)-(f) (1988) (exclusive district court jurisdiction of actions against the government), and see 28 U.S.C. §§ 1491-1509 (1988) (Claims Court jurisdiction of actions against the government).

¹⁸ See *National Union Fire Ins. Co. v. United States*, 19 Cl.Ct. 188, 190 (1989); *Keene Corp. v. United States*, 12 Cl.Ct. 197, 205 (1987); *Dwyer v. United States*, 7 Cl.Ct. 565, 567 (1985); *A.C. Seeman, Inc. v. United States*, 5 Cl.Ct. 386, 389 (1984); and Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573 (1967).

Between its enactment in 1868 and 1948, several changes were made in the statute, mostly minor, and with little indication of legislative intent in regards to the phrase "has pending." In 1874, a few changes, none affecting this issue, were made in the phraseology of section 8 of the Act of June 25, 1868 as that section was incorporated in the Revised Statutes of 1874, section 1067. The changes in phraseology were not meant to change the meaning of the statute. Remarks of Representative Butler, 2 Cong. Rec., 43d Cong., 1st Sess. 129 (1873). Section 1067 of the Revised Statutes of 1874 was later adopted without change as section 154 of the Judicial Code of 1911. Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1138.

However, in 1948 Congress changed the language of the statute in two ways. First, the language was changed to include suits pending against the United States as well as suits pending against agents of the United States. Act of June 25, 1948, ch. 646, 62 Stat. 942. It can be presumed that this change reflected that district courts by then had jurisdiction over some claims against the United States. See 28 U.S.C. § 1346. Second, and more importantly, Congress also changed the language at the beginning of the statute from "No person *shall file or prosecute* in the Court of Claims, or in the Supreme Court on appeal therefrom ..." to "The Court of Claims *shall not have jurisdiction* of" (Emphasis added). The effect of this change was to eliminate a key phrase – the "shall file" language. However, the legislative history is silent on the reason for the change, other than the statement that "[c]hanges were made in phraseology." Act of June 25, 1948, ch. 646, 62 Stat. 942. Finally, in 1982, with the establishment of the Claims Court, § 1500 was amended to apply its terms to that court. 28 U.S.C. § 1500 (1988).

The plain meaning rule, although often lumped with other rules for statutory construction, also has important structural effect beyond its rhetorical value. Honestly applied, it tells a court what *not* to look at – legislative debates, committee reports, newspaper commentary and other "aids" to policy development. The meaning of the law is what the words say

it is. In cases in which a plain meaning exists, it is hard to quarrel with that construct.¹⁹ This, however, is not such a case.

Here we have neither plain meaning – the statute simply does not address *when* an earlier-filed case must be pending to invoke a § 1500 bar²⁰ – nor clear evidence of what the Congress intended on this issue. Compare, for example, our recent decision in *Amerikohl Mining, Inc. v. United States*, 899 F.2d 1210 (Fed.Cir.1990), a case involving a similar unexplained language change – between the time the draft version went to conference committee and the time it was finally enacted – in a Congressional act governing federal court jurisdiction. The original language in both the House and Senate versions stated that judicial review under the particular statute at issue was to be "only" in the District Court for the District of Columbia, but the word "only" was deleted in the final enacted version. 30 U.S.C. § 1276 (a) (1982). We held that even without the word "only" the plain meaning was clear: "... it appears from the plain meaning of the language in section 1276(a)(1) that Congress intended the District Court for the District of Columbia to be the exclusive forum ... [and] nothing in the legislative history indicates that Congress intended an interpretation contrary to the plain meaning of these words." *Amerikohl Mining, Inc.*, 899 F.2d at 1213. We declined to speculate about why the word "only" was removed, and applied the law as written.

¹⁹ But see *FBI v. Abramson*, 456 U.S. 615, 625 n. 7, 102 S.Ct. 2054, 2061 n. 7, 72 L.Ed.2d 376 (1982) (Blackmun and Brennan, JJ., and O'Connor and Marshall, J.J., dissenting in separate opinions) (citing *United States v. Monia*, 317 U.S. 424, 431, 63 S.Ct. 409, 412, 87 L.Ed. 376 (1943) (Frankfurter, J., dissenting)) ("The notion that because the words of a statute are plain, its meaning is also plain, is merely pernicious oversimplification.")

²⁰ In *Johns-Manville*, we determined that "the plain meaning of 'pending' includes cases which have been filed but stayed." 855 F.2d at 1567. Unlike the present case, in *Johns-Manville* the earlier-filed action was never *not* pending, and so the plain meaning interpretation therein does not reach the question of "when" an action must be pending to invoke § 1500.

As we have noted, the language that remains in § 1500 after the 1948 revision does not provide us with a plain answer to the question. And as we said in *Johns-Manville*, "[t]he remaining legislative history is devoid of any evidence indicating the legislature's intended purpose of section 1500." 855 F.2d at 1561. As in *Amerikohl*, we will not attempt to extrapolate the Congress' intent in changing the language of the statute; however, unlike in that case, we do not have a plain meaning.

IV.

The answer to the conundrum posed by § 1500, thus, must be found by ferreting out its underlying policy and applying it to the situation before us. The Supreme Court has recently stated: "It is a well-settled canon of statutory construction that, where the language does not dictate an answer to the problem before the Court, 'we must analyze the policies underlying the statutory provision to determine its proper scope.'" *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 831 n. 7, 103 S.Ct. 1587, 1592 n. 7, 75 L.Ed.2d 580 (1983) (quoting *Rose v. Lundy*, 455 U.S. 509, 517, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982)). The statement by Senator Edmund, the sponsor of § 1500, explaining the purpose of the statute, is "an authoritative guide to the statute's construction." *Bowsher v. Merck & Co., Inc.*, 460 U.S. 824, 832-33, 103 S.Ct. 1587, 1592-93, 75 L.Ed.2d 580 (1983) (citing *North Haven Board of Education v. Bell*, 456 U.S. 512, 527, 102 S.Ct. 1912, 1921, 72 L.Ed.2d 299 (1982)).

Recently the Claims Court in a well-reasoned opinion reviewed the purpose of § 1500:

Section 1500 clearly precludes the Claims Court's exercise of jurisdiction over proceedings with similar claims against the United States that were filed previously and remain pending in other courts. The section was enacted over a century ago to avoid the maintenance of suits against the United States in the Court of Claims after a claimant failed to receive satisfaction from suit against the United States elsewhere. At that time a judgment in another court

had no res judicata effect in a subsequent suit against the United States in the Court of Claims. [Citation omitted]. The legislative history and cases indicate that section 1500 was created for the benefit of the sovereign and was intended to force an election when both forums could grant the same relief, arising from the same operable facts. *Johns-Manville v. United States*, 855 F.2d 1556, 1564 (Fed. Cir.1988). *The current purpose served by this section is to relieve the United States from defending the same case in two courts at the same time. Id.* at 1562; *Dwyer*, 7 Cl.Ct. at 567.

Connecticut Dept. of Children & Youth Serv. v. United States, 16 Cl.Ct. 102, 104 (1989) (emphasis added).

An important purpose, then, of § 1500 – and one that remains important – is to conserve Government resources. In order to achieve this purpose, the Government contends that § 1500 is a jurisdictional statute – like the diversity jurisdiction statute – and that like other jurisdictional statutes, the jurisdictional determination must be made by looking to the existence or non-existence of jurisdiction at the time a complaint is filed. Appellants, on the other hand, argue that if there are no other suits pending at the time the Claims Court considers a § 1500 motion, then jurisdiction is not barred; since the purpose of § 1500 is to relieve the United States from defending the same claims in two courts *at the same time*, that purpose would only be subverted if a claimant had another claim *presently* pending in another court, not *formerly* pending.

Both parties agree generally, in accord with Senator Edmunds' expressions, that the purpose of § 1500 is to conserve the Government's limited resources. Both parties propose answers that would achieve that result. When there are two reasonable alternative constructions of a statute, it is the court's duty "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *FBI v. Abramson*, 456 U.S., 615, 625 n. 7, 102 S.Ct.

2054, 2061 n. 7, 72 L.Ed.2d 376 (1982) (Blackmun and Brennan, J.J., and O'Connor and Marshall, J.J., dissenting in separate opinions) (quoting *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297, 77 S.Ct. 330, 338, 1 L.Ed.2d 331 (1957)).

[4.5] While the Government's theory has a bright-line advantage, it fails in two respects. First, the analogy of the diversity jurisdiction statute to § 1500 does not withstand analysis. The purpose behind the diversity jurisdiction statute, 28 U.S.C. 1332 (1988), is to insure an impartial tribunal for citizens of different states. *Pease v. Peck*, 59 U.S. (18 How.) 595, 15 L.Ed. 518 (1855); *Burt v. Isthmus Dev. Corp.*, 218 F.2d 353 (5th Cir.), *cert. denied*, 349 U.S. 922, 75 S.Ct. 661, 99 L.Ed. 1254 (1955). Section 1332 creates jurisdiction in a federal court where none would otherwise exist, i.e. no subject matter jurisdiction. The purpose behind § 1500, on the other hand, is to save the Government from having to defend the same suit in two different courts at the same time. Section 1500 takes away jurisdiction even though the subject matter of the suit may appropriately be before the Claims Court. Operationally these two statutes focus on different points in time. The former says, "ordinarily your subject matter cannot be here, but if you satisfy the requirements of this statute, then you may *go ahead and proceed* in federal court." The latter says, "though your subject matter may appropriately be here in the Claims Court, if you come within the proscriptions of this statute, then you *may no longer proceed* here."

Second, the Government's theory fails because it too early cuts off the recourse of litigants who, either because of subject matter or other circumstances, may be found entitled to pursue their claims only in the Claims Court, and who would not otherwise violate the policy behind § 1500. The facts of the present case offer a good example. UNR had third-party complaints against the Government pending in federal district court. Unsure of whether the district court had jurisdiction, and facing a running of the statute of limitations, UNR filed the same claim in the Claims Court. More than two years before the Claims Court entertained and acted on the Government's § 1500 motion to dismiss, the district court dismissed UNR's third-party complaints

for lack of jurisdiction.²¹ By the time the Claims Court entertained and acted on the Government's § 1500 motion, UNR had no earlier-filed suits pending and had yet to have its day in court. We believe the statute does not operate to preclude UNR from having its day.

Our earlier cases dealing with § 1500, particularly those decided since 1948 when the statute was amended to remove the "filing" language, do not explicitly address the "when filed" question. In those cases in which the question is implicitly involved, the results are generally consistent with this approach. For example, in *British American Tobacco Co. v. United States*, 89 Ct.Cl. 438 (1939),²² the plaintiff had filed the same claim in a district court and later the same day in the Court of Claims. At the time the Court of Claims entertained the Government's motion to dismiss, the district court action was no longer pending – it had been decided. The Court of Claims dismissed the action because the district court action constituted a final adjudication on the merits. This is in full accord with our ruling today. A plaintiff is not entitled to two bites at the apple. As the *British American Tobacco* case illustrates, when a district court case is no longer pending because it received final adjudication on the merits, the plaintiff is not then entitled to proceed in the Claims Court – the doctrine of *res judicata* accomplished exactly what § 1500 was originally devised to protect against.

In *Wessel, Duval & Co., Inc. v. United States*, 124 F.Supp. 636, 129 Ct.Cl. 464 (1954), at the time the Court of Claims entertained and acted on the Government's motion to dismiss, the same claim was pending in a district court, and so the Court of Claims dismissed the Action before it. The holdings in *Boston*

²¹ See *supra* note 7 and accompanying text.

²² In 1982 Congress created the Federal Circuit which succeeded the Appellate Division of the Court of Claims. The Federal Circuit thus views the decisions of that court as binding precedents. At the same time, Congress created the Claims Court to succeed the Trial Division of the Court of Claims, and § 1500 was amended to continue coverage in the newly formed Claims Court.

Five Cents Sav. Bank, FSB v. United States, 864 F.2d 137 (Fed.Cir.1988), *City of Santa Clara v. United States*, 215 Ct.Cl. 890 (1977), and *Casman v. United States*, 135 Ct.Cl. 647 (1956), are inapposite because the pending district court claims in those cases involved a type of relief, i.e. declaratory judgment, that was not available in the Claims Court.

In *Brown v. United States*, 358 F.2d 1002, 175 Ct.Cl. 343 (1966), the Court of Claims considered whether § 1500 barred its jurisdiction when a claim in an earlier-filed district court suit was dismissed for lack of subject matter jurisdiction. The Court of Claims had originally dismissed the claim because at the time it first entertained and acted on the Government's motion to dismiss, the claim was still pending in the district court. *Id.* 358 F.2d at 1004. However, the district court later dismissed the claim for lack of subject matter jurisdiction and the plaintiff moved for a rehearing in the Court of Claims. Under these circumstances, the Court of Claims denied the Government's § 1500 motion to dismiss, stating:

Our earlier order of dismissal was predicated on the fact that the other "claim remains pending in the said District Court." That is no longer true, and the claim is no longer "pending in any other court." In this situation, we do not believe that 28 U.S.C. § 1500 requires us to deprive the plaintiffs of the only forum they have in which to test their demand for just compensation. . . . Section 1500 was designed to require an election between two forums both of which could presumably grant the same type of relief. [Citations Omitted]. But Section 1500 was not intended to compel claimants to elect, at their peril, between prosecuting their claim in this court (with conceded jurisdiction, aside from Section 1500) and in another tribunal which is without jurisdiction. Once the claim has been rejected by the other court for lack of jurisdiction, there is no basis in the policy or wording of the statute for dismissal of the claim pending here.

Id. 358 F.2d at 1004-05.

Under the facts of the present case, the reasoning in *Brown* applies with even greater force. In *Brown*, the Court of Claims held that § 1500 did not bar jurisdiction even though the earlier-filed suit was dismissed after the Court of Claims suit was filed, and even though the Court of Claims had already once dismissed the suit because the district court action was still pending. In the present case, all of the earlier-filed suits were dismissed before the Claims Court entertained and acted on for the first time the Government's § 1500 motion to dismiss.

In *Connecticut Dept. of Children & Youth Serv. v. United States*, 16 Cl.Ct. 102 (1989), the Claims Court was confronted with a situation similar to that in *Brown*. In this case, the plaintiff originally filed suit in the district court, but then filed the same complaint in the Claims Court because it realized that the district court might not have jurisdiction and feared that the statute of limitations might run before the district court considered the matter. Unlike *Brown*, however, the district court suit had not been dismissed by the time the Claims Court entertained and acted on the § 1500 motion to dismiss. Given its predicament, the plaintiff asked the court to stay its action until the subject matter jurisdiction of the district court was resolved. The Claims Court correctly noted that under our holding in *Johns-Manville, supra*, the grant of a stay would not escape the bar of § 1500. It went on to note, however, that "[s]hould the federal district court lose its hold on the pending matter, finding it has no jurisdiction over the refund claim, section 1500 would no longer apply and this court would then be freed from the jurisdictional bonds that preclude action at this time." 16 Cl.Ct. at 105.

The Government argues that the *Connecticut Dept. of Children* holding is limited to circumstances in which the statute of limitations has not otherwise run. This, it deems, is the import of the Claims Court's language immediately following the above quote: "Then, and should the limitations period not have passed, this court should properly take and adjudicate the relevant issues. *Brown*, 175 Ct.Cl. at 348, 349, 358 F.2d at 1004, 1005." This, however, was not a condition of the *Brown* holding.

In *Brown* the Court of Claims stated: "The plaintiffs could undoubtedly file a new petition, without any bar through Section 1500; it does not seem fair or make sense to insist that this must be done — *with the limitations difficulties it may well entail.*" 358 F.2d at 1005 (emphasis added). In fact, the court in *Brown* suggested that it is when the statute of limitations *does* run that § 1500 should not bar jurisdiction when the earlier-filed suit is dismissed and the Claims Court action was filed before the running of the limitations statute. Section 1500 does not impose a statute of limitation. So the Court of Claim's first statement, i.e. "plaintiffs could undoubtedly file a new petition, without any bar through Section 1500," merely acknowledges that the same claim would not be pending in two different courts at the same time.

V.

[6] We hold then that when an earlier-filed district court case is finally dismissed before the Claims Court entertains and acts on a § 1500 motion to dismiss, § 1500 does not bar Claims Court jurisdiction even though the dismissal may have occurred after the filing of the Claims Court action. Under today's decision the § 1500 bar can only be invoked if the Government can show that the earlier-filed suit is still pending at the time the Claims Court entertains and acts on the jurisdictional question.

The Government warns that any interpretation of § 1500 that varies its focus from the time of filing will unduly burden the United States by forcing it to defend an earlier-filed district court complaint and a Claims Court complaint on the same basic claim at the same time, and would in effect give a plaintiff "two bites at the apple." The Government further warns that such interpretation will require the Claims Court to undertake a burdensome analysis to determine whether the earlier-filed suit is pending. The decision, however, does not fuel these worries.

A claimant is entitled to its day in court. That does not mean, however, that a claimant is entitled to tie up Government resources by forcing it to simultaneously defend itself in two

courts. And this is what § 1500 protects against. If an earlier-filed action is finally dismissed before the Claims Court entertains and acts on the jurisdictional question, then the Claims Court action will be the only suit pending and the plaintiff will have but one day in court.²³ If at the time the Claims Court entertains and acts on the jurisdictional question the earlier-filed action is still pending, i.e. not finally dismissed, then § 1500 will bar jurisdiction. Plaintiff will then either have to proceed with the earlier-filed action or come back to the Claims Court, if a statute of repose does not prevent, should its district court action be dismissed. The determination that the Claims Court must make is straightforward. Under this rule it is not possible for a plaintiff to prosecute an action both in the Claims Court and in another court at the same time. This is what § 1500 precludes.

VI.

The dissent suggests three simple rules to be derived from § 1500 in lieu of the rule here announced. Rule 1 would key the application of § 1500 to the date of filing of the suit in the Claims Court, so that the same case previously filed and still pending in another court on the date the Claims Court suit is filed would automatically bar the Claims Court case, regardless of whether the previously-filed case is ultimately dismissed in a manner that denies the plaintiff its day in court, or whether the Government is called upon to invest any significant resources in defending the Claims Court action. That is not an unreasonable reading of the statute, but for the reasons stated we find that, given the inherent ambiguity of the statute, both sound policy and legislative history support a different reading.

Rule 2 would apply the same result to the reverse sequence of filing. That is, if the suit is first filed in the Claims Court, and then later in another court, the second filing divests *pro*

²³ This opinion is limited to earlier-filed suits that are dismissed. Obviously, if an earlier-filed suit is carried through to final adjudication on the merits and is thus no longer pending at the time the Claims Court considers § 1500 jurisdiction, the action would be subject to res judicata principles.

tanto the Claims Court of jurisdiction. Rule 2 requires overruling *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 170 Ct.Cl. 389 (1965), which holds that § 1500 on its terms only applies to Rule 1 cases, and not to the reverse sequence cases.

It may well be that *Tecon* does result in an anomalous situation, one not to be lightly attributed to a rational legislature. Cf. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575, 102 S.Ct. 3245, 3252, 73 L.Ed.2d 973 (1982) ("interpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available"). However, if, as the dissent argues, the time of filing is the critical jurisdictional determinant, Rule 2 cannot logically follow. For in a reverse sequence case, at the time the Claims Court takes jurisdiction there are no other cases pending.

The dissent tries to avoid this logic trap by arguing that jurisdiction is a continuing concept, and that if at some later time requisite events occur, such as the filing of a suit in another court, the Claims Court will be divested of jurisdiction. This adopts at least in part our theory: it is not simply a question of whether at the time of filing there is a pending case, but whether there are two cases being litigated that invokes the bar of § 1500. In short, we reach the same result as the dissent under Rule 2, but we arrive there by applying a consistent rule.

Rule 3 simply restates the principle of res judicata as it applies to these cases; there is no disagreement here.

VII.

UNR filed its Claims Court action on January 16, 1984. Its earlier filed district court cases, i.e. Model Third-Party Complaints A & B, were all dismissed either as of March 12, 1987, or October 20, 1988 when UNR voluntarily dismissed all of its third-party actions that had been stayed through bankruptcy proceedings.

E-P filed its Claims Court action on March 25, 1983. One of its earlier-filed district court cases, *Lopez*, was dismissed on May 19, 1986. Its other earlier-filed district court cases, i.e. Model Third-Party Complaints A & B, as well as some other cases, were dismissed no later than March 12, 1987.

Keene filed its first Claims Court action on December 21, 1979 and its second Claims Court action on September 25, 1981. The earlier-filed district court case that preceded both *Keene I* and *Keene II*, i.e. *Miller*, was dismissed in 1980. Keene's other earlier-filed district court case, *Keene (SDNY)*, which only preceded *Keene II*, was dismissed on September 30, 1981.

The Claims Court entertained and acted on the Government's § 1500 motion to dismiss UNR, E-P and Keene on June 1, 1989. Since none of those parties had the same claims pending in another court on June 1, 1989, we hold that § 1500 does not bar Claims Court jurisdiction.

Keene argues that one of its earlier-filed actions, i.e. *Miller*, does not involve the same "claim" as its Claims Court action (*Keene I*) and that § 1500 therefore does not bar Claims Court jurisdiction. We here decide that *Miller* was not pending so as to bar Claims Court jurisdiction because that case was dismissed before the Claims Court entertained and acted on the Government's § 1500 motion to dismiss. Thus, we need not reach the question of whether *Miller* involved the same claim as *Keene I*.

CONCLUSION

Accordingly, we hold that 28 U.S.C. § 1500 does not bar jurisdiction of the Claims Court when the earlier-filed claim has been finally dismissed after the Claims Court action is filed but before the Claims Court entertains and acts on the Government's § 1500 motion. The Order of the Claims Court dismissing these cases for lack of jurisdiction is therefore reversed and the case is remanded for further action consistent herewith.

REVERSED and REMANDED.

MAYER, Circuit Judge, dissenting.

In my view, the rule announced by the court, that the jurisdictional bar of 28 U.S.C. § 1500 (1988) applies only if the earlier-filed district court case is still pending at the time the Claims Court considers the jurisdictional question, is contrary to the unambiguous language of the statute, its purpose and history. The jurisdiction of the Claims Court should not depend on when a motion to dismiss under section 1500 is filed or is considered by the court, but on whether the same claim is before another court when the Claims Court suit is filed. By today's new rule jurisdiction turns on things like the state of the trial court's docket and the diligence of the assigned judge, factors completely unrelated to the purpose of section 1500 or any other jurisdictional statute, and which are bound to lead to erratic and unpredictable rulings. I respectfully dissent.

By the plain language of section 1500, if the same claim is pending in another court when the plaintiff files his complaint in the Claims Court, there is no jurisdiction, even if the conflicting claim is no longer pending when a motion to dismiss is brought or considered by the court. See *British Am. Tobacco Co. v. United States*, 89 Ct.Cl. 438, 441 (1939) ("there is no merit in the contention ... that this court has jurisdiction ... for the reason that the suit in the District Court has been dismissed and is not now pending").¹ In the context of section 1500, "has pending" means pending at the time the complaint is filed in the Claims Court; it is fundamental that the facts establishing

¹ *British Am. Tobacco* was decided under section 154 of the Judicial Code of 1911 (Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1138), later codified at 28 U.S.C. § 260 (1940), the immediate predecessor to section 1500:

No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

jurisdiction must exist when a suit is filed and defects in jurisdiction cannot be cured by post-filing occurrences.

This construction of section 1500 is consistent with its purpose and legislative history. The original intent was to force an election between a suit in the Court of Claims and one in district court on the same claim. To permit a plaintiff to file and maintain suits in both courts until the government moves to dismiss the Claims Court suit is repugnant to that intent. The government also would end up defending two suits at the same time, contrary to the currently recognized purpose of section 1500.

The language of the original statute,² "no person shall file or prosecute any claim ... for or in respect to which he ... shall have commenced and has pending any suit or process in any other court," supports this interpretation of the current provision. From that original language, it is readily apparent that any suit *filed* in the Court of Claims when the same claim was pending in another court fell within the statutory bar and had to be dismissed, no matter when the jurisdictional objection was raised and regardless of intervening actions in the conflicting case. When Congress changed the statute to read "the Court of Claims shall not have jurisdiction ...," the meaning was not changed because jurisdiction must be determined as of the time the complaint is filed.

This is not the first time section 1500 has been given an elastic construction because of its perceived harshness or a sense that

² Section 8 of the Act of June 25, 1868, 15 Stat. 77:

And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States....

it is anachronistic. See, e.g., *Brown v. United States*, 358 F.2d 1002 (Ct.Cl.1966); *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 170 Ct.Cl. 389 (1965). But it is still on the books, and it engenders no end of litigation. If it were up to me, these simple rules would govern the use of section 1500: 1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on; 2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction, regardless of when the court memorializes the fact by order of dismissal; and 3) if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata apply. Except for the apparent judicial antipathy for section 1500, these rules would seem to follow logically from its straightforward language. The Supreme Court thought so when it said in *Corona Coal Co. v. United States*, 263 U.S. 537, 540, 44 S.Ct. 156, 156, 68 L.Ed. 431 (1924), "the words of the statute³ are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship in particular cases."

The first rule would govern this case. Arguably, as the court suggests, *ante* at 665, it is inconsistent with *Brown*, 358 F.2d 1002,⁴ where the Court of Claims vacated its section 1500 dismissal because the claim that was pending in district court at the time the complaint was filed had been dismissed on jurisdictional grounds by the time the plaintiffs asked for reconsideration of the Court of Claims dismissal. The court did not require the plaintiffs to refile their complaint, apparently because the statute of limitations had run. The reasoning in

³ The Court was referring to section 154 of the Judicial Code of 1911, see n. 1 *supra*.

⁴ And arguably *Brown* is inconsistent with *British Am. Tobacco*, 89 Ct.Cl. 438.

Brown that "Section 1500 was not intended to compel claimants to elect, at their peril, between prosecuting their claim in [the Court of Claims] (with conceded jurisdiction, aside from Section 1500) and in another tribunal which is without jurisdiction," *id.* at 1005, has nothing to do with the plain meaning and purpose of the statute. As in this case, it may have seemed unfair "to deprive plaintiffs of the only forum they [had] in which to test their demand," *id.* at 1004, but there is no room for these considerations in the face of the clear mandate of section 1500. If *Brown* is an impediment, it should be overruled.

The second rule, that the Claims Court be divested of jurisdiction if, after the complaint is filed, the plaintiff files suit on the same claim in another court, is also required by the plain language of section 1500. Jurisdiction must exist at all times during a lawsuit and may be defeated by post-filing occurrences. That is how early cases in both the Supreme Court and the Court of Claims construed the statute. *Corona Coal*, 263 U.S. 537, 44 S.Ct. at 156, dismissed an appeal from the Court of Claims under the predecessor section 154 of the Judicial Code of 1911 because the plaintiff had filed suit in district court on the same claim after the appealed judgment had issued. *Matson Navigation Co. v. United States*, 72 Ct.Cl. 210, 213 (1931), *aff'd on other grounds*, 284 U.S. 352, 52 S.Ct. 162, 76 L.Ed. 336 (1932), relied on this aspect of *Corona Coal*:

The act not only prohibits the filing but also the *prosecution* of any claim in the Court of Claims when another suit on the same cause of action is pending in another court. The seven suits in the District Court of California were filed one day after the suit was filed in this court, but the plaintiff is now attempting to prosecute the suit in this court while the suits in the district court are pending. This is prohibited under the statute.

Hobbs v. United States, 168 Ct.Cl. 646 (1964), is to the same effect.

Congress intended not to dictate the order in which a claimant files suits in the Claims Court and another court on the

same claim, but to discourage him from doing so altogether. Otherwise the purpose of saving the government from defending the same claim in two courts at the same time would be defeated. Therefore, *Tecon Engineers*, 343 F.2d 943, which held that section 1500 applies only when suit is filed in another court on the same claim *before* the complaint is filed in the Court of Claims, should be overruled. That case relied on the deletion of the words "or shall commence and have pending" from the original bill proposed as section 8 of the Act of June 25, 1868.⁴ *Id.* at 947. But this deletion did not change the plain meaning of the statute. As recognized in *Matson Navigation Co.*, the words "no person shall file *or prosecute*" mean that a claimant cannot continue to prosecute his Court of Claims suit if he later files the same claim in another court. 72 Ct.Cl. at 213. Thus, the deleted language was superfluous. The meaning of the original statute, as well as of the present section 1500, is that the Claims Court loses jurisdiction when the same claim is filed in another court.

Finally, if the same claim has been before another court but is no longer, ordinary rules of res judicata apply if suit is then filed in the Claims Court. There is no call to invoke section 1500 at all in that event, although other jurisdictional impediments like the statute of limitations might yet remain.

⁴ The original bill, 81 Cong.Globe, 40th Cong., 2d Sess., 2769, provided:

Sec. 8. And be it further enacted, That no person shall file or prosecute any claim or suit in the Court of Claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending, *or shall commence and have pending*, any suit or process in any other court against any officer or person who, at the time of the cause as above alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States....

APPENDIX E

KEENE CORPORATION, Plaintiff,

v.

The UNITED STATES, Defendant,

**EAGLE-PICHER INDUSTRIES,
INC., Plaintiff,**

v.

The UNITED STATES, Defendant,

GAF CORPORATION, Plaintiff,

v.

The UNITED STATES, Defendant,

UNR INDUSTRIES, INC., et al., Plaintiffs,

v.

The UNITED STATES, Defendant,

**FIBREBOARD
CORPORATION, Plaintiff,**

v.

The UNITED STATES, Defendant,

**H.K. PORTER COMPANY,
INC., Plaintiff,**

v.

The UNITED STATES, Defendant,

**RAYMARK INDUSTRIES,
INC., Plaintiff,**

v.

The UNITED STATES, Defendant.

**Nos. 579-79C, 585-81C, 170-83C,
287-83C, 16-84C, 514-84C,
515-85C and 12-88C.**

United States Claims Court.

June 1, 1989.

As Amended by Order of
Reconsideration June 28, 1989.

Paul C. Warnke, Washington, D.C., for plaintiff Keene Corp. John E. Kidd and Lauren B. Homer, Anderson Russell Kill & Olick, P.C., New York City, and Philip H. Hecht, Clifford & Warnke, of counsel.

William J. Spriggs, Washington, D.C., for Eagle-Picher Industries, Inc. Joe G. Hollingsworth, Paul G. Gaston, and Catherine R. Baumer, of counsel.

Paul A. Zevnik, Washington, D.C., for GAF Corp. Sidney S. Rosdeitcher, David G. Bookbinder, and William N. Gerson, Paul, Weiss, Rifkind, Wharton & Garrison, New York City, of counsel.

Joe G. Hollingsworth, Washington, D.C., for UNR Industries, Inc. William J. Spriggs, Paul G. Gaston, and Catherine R. Baumer, of counsel.

Robert M. Chilvers, San Francisco, Cal., for Fibreboard Corp.

Peter J. Kalis, Pittsburgh, Pa., for H.K. Porter Co., Inc. Thomas E. Birsic, Kirkpatrick & Lockhart, Pittsburgh, Pa., of counsel.

Jeffrey D. Lewin, San Diego, Cal., for Raymark Industries, Inc. Donald G. Rez, Sullivan, McWilliams, Lewin & Markham, San Diego, Cal., of counsel.

Scott D. Austin, John Beling, William E. Michaels, Henry T. Miller, and David S. Fishback, Sr. Trial Counsel, Washington, D.C., with whom were John R. Bolton, Asst. Atty. Gen. for defendant. J. Patrick Glynn, Director, Torts Branch, and Harold J. Engel, Deputy Director, of counsel.

OPINION

NETTESHEIM, Judge.

These cases are before the court on defendant's motion for summary judgment based on lack of jurisdiction under the restriction imposed by 28 U.S.C. § 1500 (1982).

BACKGROUND

On April 6, 1987, the Claims Court entered an order provisionally dismissing three cases brought by Johns-Manville Corporation and Johns-Manville Sales Corporation (Nos. 465-83C, 688-83C, & 1-84C). *Keene v. United States*, 12 Cl.Ct. 197 (1987). These three cases sought indemnification for plaintiff's liabilities to shipyard workers for injuries caused by exposure to asbestos. Because the same claims were pending in other courts at the same time plaintiffs commenced their actions in the Claims Court, jurisdiction was foreclosed by 28 U.S.C. § 1500. The statute provides:

The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

The order was certified for interlocutory review.¹ On appeal plaintiffs-appellants argued before the Federal Circuit that since their third-party suits against the Government in district courts are based on tort theories and the direct action suits in Claims Court are founded on express and implied contract, they are different claims and thus not subject to the bar of section 1500. Further, they contended that where, as here, subject matter jurisdiction is not concurrent, forcing a plaintiff to elect between proceeding in district courts or the Claims Court, a strict

¹ The order was reviewed *sub nom.* *Johns-Manville Corp. v. United States*.

application of section 1500 may preclude any judicial hearing of some theories of recovery. Since district courts have exclusive jurisdiction of tort actions against the United States and the Claims Court has exclusive jurisdiction of contract claims above \$10,000, appellants also argued that proceeding in only one forum at a time to avoid offending section 1500 may mean that the statute of limitations eliminates the possibility of pursuing an alternative remedy.

Basing its analysis on both the legislative history of section 1500 and on case law disclosed by the predecessor United States Court of Claims interpreting the term "claim" as used in the statute, the Federal Circuit reasoned that a claim is defined by the facts supporting a suit. Thus, claims grounded on different legal theories of recovery, but founded on the same underlying facts, regardless of what legal theory of recovery those facts are used to support, were held to be the same claim. Since appellants' claims in district court and in the Claims Court were based on the same operative facts, they constitute the same claim, and, thus, the Claims Court correctly held that section 1500 denied it jurisdiction of these cases. *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1563-64 (Fed.Cir.1988) (per curiam), *cert. denied*, ___ U.S. ___, 109 S.Ct. 1342, 103 L.Ed.2d 811 (1989), *aff'g. Keene Corp. v. United States*, 12 Cl.Ct. 197.

The appellee court concluded that section 1500 "was enacted for the benefit of the government and was intended to force an election where both forums could grant the same relief, arising from the same operative facts." 855 F.2d at 1564. Since a plaintiff has no right to pursue a claim in multiple courts simultaneously, Congress' action in forcing an election was aimed at preventing precisely that which would result if appellants' position was adopted — the necessity for the Government to defend the same claim both in the Claims Court and in district courts.

The dismissed cases were but three of eleven cases filed in the Claims Court by asbestos product manufacturers seeking indemnification and/or contribution from the United States for damages incurred in litigating or settling claims from injured

shipyard workers. Following affirmance of the trial court's order, defendant, on November 16, 1988, moved for summary judgment in the remaining eight cases.² This motion asserted that, following the rationale of the Federal Circuit, at the time of filing in the Claims Court (or its predecessor), plaintiffs in all eight cases had "pending in . . . [another] court" a suit(s) against the United States. Proceedings on defendant's motion were stayed while appellants in *Johns-Manville Corp.* asked the Supreme Court to consider the order, and briefing resumed and argument on defendant's motion was held after the Supreme Court declined further review.

In order to rule on defendant's motion, this court must first examine the suits identified by defendant to determine (1) if they make the same claims as those made by plaintiffs in the Claims Court, *i.e.*, are predicated on the same operative facts, irrespective of the legal theory pleaded; and (2) as to each plaintiff in the Claims Court, whether its prior-filed suit was pending at the time its Claims Court suit was filed.

FACTS

Plaintiffs are Keene Corporation ("Keene"); Eagle-Picher Industries, Inc. ("Eagle-Picher"); GAF Corporation ("GAF"); UNR Industries, Inc., and UNARCO Industries, Inc. (collectively referred to as "UNR"); Fibreboard Corporation ("Fibreboard"); H.K. Porter Company, Inc. ("H.K. Porter"); and Raymark Industries, Inc. ("Raymark"). Keene has pending two actions in the Claims Court; the remaining plaintiffs, one each. The factual section of this opinion examines the allegations of the actions filed in district court, some of which involve multiple Claims Court plaintiffs; discusses the present status of these actions; and examines the allegations of each plaintiff's Claims Court action.

² On February 27, 1987, defendant moved in respect of five of the plaintiffs, as well as the Johns-Manville plaintiffs. Further briefing and decision were deferred pending the decision in *Johns-Manville Corp.* See *Keene Corp.*, 12 Cl.Ct. at 198-99 n.1.

I. *In re All Maine Asbestos Litigation*, Master Asbestos
Docket (D.Me., filed July 21, 1982)

In the omnibus *In re All Maine Asbestos Litigation*, a consolidation of 225 suits brought by present or former shipyard workers or their representatives claiming injury from exposure to asbestos at two Maine shipyards, defendant manufacturers and suppliers commenced third-party actions for contribution or indemnification against the United States. These third-party suits were initiated by Model Third-Party Complaint Against the United States of America "A" ("Model Third-Party Complaint A"), in which the underlying plaintiffs claimed exposure at Bath Iron Works, a private shipyard, and by Model Third-Party Complaint Against the United States of America "B" ("Model Third-Party Complaint B"), in which the underlying plaintiffs claimed exposure at Portsmouth Naval Shipyard.¹ In both of these complaints, filed on July 21, 1982, Eagle-Picher, UNR, Fibreboard, H.K. Porter, and Raymark were third-party plaintiffs.

1. Model Third-Party Complaint A

Five of the complaint's nine claims are based on negligence and are differentiated by the source and substance of the duty owed and allegedly breached.

Claim 1: Duty to warn of risk of exposure based on the Government's role as seller of asbestos.

Claim 5: Duty to exercise care for workers' safety and to warn them of potential risk based on the Government's role as promulgator of specifications requiring use of asbestos and as the party in control of shipyards.

Claim 6: Duty to exercise care for workers' safety and to warn them of potential risk based on third-party defendant's controlling role in the shipyards, both as owner of vessels and as promulgator of specifications requiring the use of asbestos.

¹ Unlike the claims made in the *Johns-Manville Corp.* suits, the *In re All Maine Asbestos* claims did not specify a time period during which plaintiffs were exposed to asbestos and asbestos products.

Claim 7: Duty to warn and to establish adequate safety regulations and to enforce the safety regulations established based on the Government's controlling role in undertaking study and control of risks of asbestos exposure.

Claim 8: Duty to warn of harm from interaction of tobacco and asbestos exposure based on third-party defendant's superior knowledge of danger of that interaction.

Claim 2, in strict liability, is stated contingently: The manufacturers deny plaintiffs' allegation that the asbestos and asbestos products that they sold were defective or unreasonably dangerous. However, the third-party plaintiff's claim that if the asbestos and asbestos products that they sold are found to have been defective or unreasonably dangerous, then the asbestos and asbestos products sold by third-party defendant to them were defective and unreasonably dangerous.

Model Third-Party Complaint A contains two claims based on implied warranty. Claim 3 alleges breach of warranty of safety and fitness for intended purpose based on third-party defendant's role as seller of asbestos. Claim 4 alleges breach of an implied warranty to exercise due care in specifying asbestos products and in regulating their use to ensure a safe workplace.

Finally, the complaint contains a claim stating that if admiralty jurisdiction applies, third-party plaintiffs are entitled to contribution and indemnification under admiralty and maritime law.

2. Model Third-Party Complaint B

This complaint essentially mirrors Model-Third Party Complaint A, with the following minor exceptions. Negligence claims 6 and 8 plead breach of duty to warn of dangers of asbestos exposures subsequent to shipyard employment. Claim 2 alleges strict liability only for raw asbestos sold by third-party defendants, not asbestos products.

3. Current Status

The third-party actions in *In re All Maine Asbestos Litigation* have been dismissed by the federal district court in Maine.

All claims of Model Third-Party Complaint A but one were dismissed by order of February 23, 1984. *In re All Maine Asbestos Litigation*, 581 F.Supp. 963 (D.Me.1984). Dismissal of Claim VI against the Government as vessel owner was denied. Following reconsideration of its position on the vessel owner claim, the court on March 12, 1987, entered an order dismissing the remaining Model Third-Party Complaint A claim. *In re All Maine Asbestos Litigation (BIW Cases)*, 655 S.Fupp. 1169 (D.Me.1987). The orders of dismissal were affirmed on July 20, 1988. *In re All Maine Asbestos Litigation (BIW Cases)*, 854 F.2d 1328 (Fed.Cir.1988) (Table), *aff'g mem.*, 651 F.Supp. 913 (D.Me.1986), 655 F.Supp. 1169 (D.Me.1987).

The contract and tort claims of Model Third-Party Complaint B also were dismissed in 1984, but decision on the vessel owner claim was reserved. *In re All Maine Asbestos Litigation*, 581 F.Supp. at 981. Dismissal of that claim was later denied. *In re All Maine Asbestos Litigation (PNS Cases)*, 589 F.Supp. 1571 (D.Me.1984). On interlocutory review of the ruling on the admiralty claim, the First Circuit reversed, and subsequently a petition for writ of *certiorari* was denied. *In re All Maine Asbestos Litigation (PNS Cases)*, 772 F.2d 1023 (1st Cir.1985), *cert. denied*, 476 U.S. 1126, 106 S.Ct. 1994, 90 L.Ed.2d 675 (1986). Finally, the district court entered an order dismissing with prejudice all claims against the United States in Model Third-Party Complaint B. *In re All Maine Asbestos Litigation (PNS Cases)* Master Asbestos Docket (D.Me. July 16, 1986).

II. Claims Court cases involving Third-Party plaintiffs in *In re All Maine Asbestos Litigation*

1. *Eagle-Picher Industries, Inc.*, No. 170-83C (Cl.Ct., filed Mar. 25, 1983)

On March 25, 1983, Eagle-Picher filed suit in the Claims Court based on contractual theories allegedly entitling it to recover costs associated with litigating and settling claims against plaintiff for asbestos-caused injuries.

According to Eagle-Picher, the Government's promulgation and enforcement of specifications for asbestos products created

a warranty of accuracy, feasibility, and safety of complying products. By both writing specifications and controlling the workplace where asbestos products were used, the Government impliedly warranted that it would use sufficient care in specifying and using such products that the workplace would be safe. Eagle-Picher also alleged that the Government had an implied contractual duty to reveal to plaintiff its superior knowledge of the dangers of asbestos growing out of that superior knowledge and its role as issuer of specifications.

2. *UNR Industries, Inc.*, No. 16-84C (Cl.Ct., filed Jan. 16, 1984)

On January 16, 1984, UNR filed an action in the Claims Court seeking money damages for breach of express and implied contracts. The complaint alleges breach of five warranties or contractual duties: a warranty of safety arising from the Government's participation in development of UNR's asbestos products based on the Government's promulgation and enforcement of product specifications; a warranty that those specifications were accurate, feasible, and safe based on the Government's role as supplier of asbestos and from its requirement that asbestos be used in UNR's insulation products; a warranty that such products would be free of defects based on the Government's role in controlling the development of insulation products and in controlling the use of the products in the shipyards; and a warranty that those products would be used safely based on the Government's superior knowledge of the danger posed by asbestos products and a contractual duty to reveal that knowledge to UNR.

3. *Fibreboard Corp.*, No. 514-84C (Cl.Ct., filed Oct. 4, 1984)

Filed in the Claims Court on October 4, 1984, Fibreboard's complaint grounds entitlement to indemnification for expenses incurred in settling claims against Fibreboard brought by shipyard workers exposed to asbestos products supplied by Fibreboard "[d]uring World War II, and at other times." Compl. ¶ 1, on the Government's breach of express and implied

contracts, on violation of a statute and the fifth amendment of the United States Constitution, and on considerations of equity.

Fibreboard makes six contract claims: 1) By writing specifications for asbestos products and requiring compliance with them, the Government warranted that the specifications were adequate and that compliance would produce a satisfactory product; 2) by requiring compliance with wartime orders and regulations, the Government impliedly agreed to hold Fibreboard harmless from any resulting liability; 3) as a supplier of raw asbestos, the Government warranted its suitability, fitness, and safety for its intended purpose; 4) by its control over specifications and over the use of the asbestos products, the Government covenanted that such use would be in a safe and proper manner, so that Fibreboard would not be deprived of the benefit of its contracts; 5) by retaining title to the asbestos used by Fibreboard, a contract of bailment was created under which the Government assumed all risks incident to its use; 6) by limiting the amount of liability insurance Fibreboard could include as a cost in its contracts, the Government agreed to assume any uninsured risks.

Fibreboard claims entitlement to recovery of costs that it incurred consequent to the Government's violation of the Selective Training and Service Act of 1940, Pub.L. No. 76-783, § 9, 54 Stat. 885 (1940), since the Government's alleged failure to take precautions to avoid injury deprived Fibreboard of the right under the Act to fair and just compensation for the performance of war contracts. Fibreboard also claims that the Government's limitation of its own liability and failure to enforce safety standards while aware of potential risks shifted liability for those risks to Fibreboard and that the costs plaintiff incurred thereby constituted a taking of Fibreboard's property without just compensation in violation of the fifth amendment. Finally, Fibreboard charges that the Government's concealment of its knowledge of the risk posed by asbestos use and of the inadequacy of precautions taken constituted bad faith in negotiating and performing the contracts, thus forming the basis for reformation of those contracts.

4. *H.K. Porter Company, Inc.*, No. 515-85C
(Cl.Ct., filed Sept. 6, 1985)

The suit by H.K. Porter, filed in the Claims Court on September 6, 1985, seeks indemnification for its damages from suits for injuries from asbestos exposure "[d]uring World War II, and at all times relevant hereto." Compl. ¶ 5. The suit encompasses four contract claims and a fifth amendment claim.

H.K. Porter's first contract claim is essentially identical to Eagle-Picher's claim based on warranty of specifications, with the further warranty that contract performance in compliance with the specifications would not increase H.K. Porter's costs. The second contract claim mirrors Eagle Picher's claim based on warranty of care in use, with the addition of an implied covenant of good faith and fair dealing that obligated the Government to specify and use H.K. Porter's products safely. H.K. Porter's fourth contract claim is the same as Eagle-Picher's superior knowledge claim. The sale by the Government of raw asbestos to H.K. Porter without including warnings allegedly created an implied warranty that the asbestos was safe, merchantable, and fit for its intended purpose. H.K. Porter's fifth amendment claim embodies the same rationale as that of Fibreboard's.

5. *Raymark Industries, Inc.*,
No. 12-88C (Cl.Ct., filed Jan. 7, 1988)

Raymark, the most recent claimant against the United States seeking indemnification for settlements and litigation of asbestos caused injuries, filed a response to defendant's summary judgment motion on December 15, 1988, stating that it had determined not to oppose defendant's motion based on prudential considerations of Federal Circuit decisions on section 1500 and on the merits and in view of RUSCC 11.

III. Third-party suits in the Western District of Washington, Nos. C-80-923M, C-80-924M, C-84-154M, *et al.* (W.D. Wash., third party filed Feb. 3, 1983)

On February 3, 1983, Eagle-Picher filed ten third-party suits against the United States seeking indemnification for its liabilities to employees with asbestos related injuries allegedly caused while employed at the Puget Sound Naval Shipyard. One of these ten cases, *Albert Lopez, et al. v. Eagle-Picher Industries, Inc. v. United States*, No. C-84-155M (W.D. Wash., filed Feb. 3, 1983), which was treated as a test case, was dismissed on May 19, 1986, for failure to state a claim. *Lopez v. Johns Manville*, 649 F.Supp. 149 (W.D. Wash. 1986). Although the decision in *Lopez* indicated that all third-party claims against the Government were dismissed, orders dismissing the remaining nine cases were not entered until June 30, 1986. The dismissal in *Lopez* was appealed and affirmed *sub nom. Lopez v. A.C. & S., Inc.*, 858 F.2d 712 (Fed. Cir.), *reh'g denied* (Nov. 21, 1988), *petition for cert. filed sub nom. Raymark Industries, Inc. v. United States*, No. 88-1418, 57 U.S.L.W. 8606 (U.S. Feb. 21, 1989). The Western District of Washington decision in *Lopez* also discussed and disposed of a number of third-party actions filed by Raymark on February 7, 1983. The Federal Circuit's affirmance of *Lopez* also affirmed the dismissal of Raymark's appeal.

The Western District of Washington suits were initiated by a complaint containing nine claims, five in negligence, two in contract, and two in admiralty.

The negligence claims, although containing minor variations in language, are the same as those made in the *All Maine Asbestos Litigation* third-party suits. Claim 3 is for breach of duty to exercise due care in making the workplace safe arising from third-party defendant's role in controlling specifications and the shipyards (*All Maine Asbestos* claim 5). Claim 4 is for breach of duty to warn and make the workplace safe based on third-party defendant's role as owner of vessels and work places (*All Maine Asbestos* claim 6). Claim 5 alleges that third-party

defendant assumed a duty to warn and to establish and enforce safety regulations by undertaking to study danger of asbestos exposure and efforts to protect the health of shipyard workers (*All Maine Asbestos* claim 7). Claim 6 alleges a duty to warn of the health risks of exposure both to tobacco and asbestos based on third-party defendant's superior knowledge of those risks (*All Maine Asbestos* claim 8). Claim 7 is for breach of duty to warn of health risks arising from third-party defendant's role as seller of raw asbestos while knowing of such risks (*All Maine Asbestos* claim 1).

The first contract claim in the Western District of Washington actions, claim 1, alleges that by writing and enforcing specifications for asbestos products, third-party defendant impliedly warranted the specifications for accuracy, feasibility, and safety. Claim 2 alleges breach of implied warranty of care in specifying and using asbestos products based on the Government's role in controlling the specifications and shipyards.

The two admiralty claims are contingent: If admiralty jurisdiction is applicable and if third-party plaintiffs are found liable for injuries sustained by shipyard workers, then third-party plaintiffs are entitled to indemnification or contribution from third-party defendant because the injuries were caused by wrongs of the Government (claim 8), and because the allegedly defective asbestos was sold by third-party defendant to the manufacturers and used by them in compliance with specifications promulgated by third-party defendant (claim 9).

IV. Claims Court cases involving third-party plaintiffs in Western District of Washington cases

Both Eagle-Picher and Raymark are third-party plaintiffs in the Washington cases. Eagle-Picher's Claims Court suit is synopsized *supra* at p. 150; Raymark's position on defendant's motion is discussed *supra* at p. 152.

V. *Mann v. Pittsburgh Corning Corp., et al. v. United States*, No. 83-477-N (E.D. Va., third party filed Jan. 13, 1984, and June 15, 1984)

Both Raymark and H.K. Porter filed third-party actions against the United States for indemnification and contribution in the *Mann* case in January and June 1984, respectively. The underlying suit alleges that Charles Wesley Mann was exposed to Raymark's asbestos products from July 1946 until February 1973, during his employment at Norfolk Naval Shipyard. The two third-party actions are currently pending in the Eastern District of Virginia.

Of the nine claims made in the third-party action, all but one are essentially the same as claims made in *All Maine Asbestos Litigation* and/or in the Western District of Washington cases. Claim 6 alleges entitlement to indemnification because, should it be found that third-party plaintiff was negligent, such negligence was passive and secondary to the active and primary negligence of third-party defendant. Under this theory primary responsibility lies with the Government for any injuries arising from asbestos exposures, because the Government controlled the workplace and specifications for asbestos products.

VI. Claims Court cases involving Third-party plaintiffs in *Mann*

Raymark's position on this motion is discussed *supra* at p. 152. The claims of H.K. Porter in the Claims Court have been addressed *supra* at p. 152.

VII. *Miller v. Johns-Manville Bldg. Prod., et al.*, No. 78-1283E (W.D.Pa., filed June 1, 1979)

This action was brought against nine asbestos suppliers, including Keene Building Products, by the personal representative of the estate of a laborer allegedly injured from asbestos exposure in 1943. A third-party action by Keene against the United States and Celotex Corporation was initiated on June 1, 1979, by the law firm of Keene's insurance company.

The theory of the third-party action is that, if plaintiff was injured by asbestos dust, the asbestos was mined and manufactured by Celotex Corporation and was supplied by, or

according to specifications of, the Government. Therefore, should Keene be found liable for plaintiff's injuries, Keene is due contribution or indemnification from Celotex Corporation and the Government.

Although it is unclear whether the court acted on Keene's motion voluntarily to dismiss its third-party complaint, defendant accepts a dismissal date of May 13, 1980.

VIII. *Keene Corp. v. United States*, No. 579-79C (Ct.Cl., filed Dec. 21, 1979; amended petition filed May 1, 1981)

The first of Keene's suits, filed on December 21, 1979, with the predecessor Court of Claims, contained four warranty claims. Subsequently, on May 1, 1981, Keene filed an amended petition, by leave, also containing four warranty claims varying to some extent from the initial four. Keene's damages grow out of more than 5,000 suits filed against it by persons alleging injury from asbestos exposure "commencing as early as the mid-1930's." Amended Pet. ¶ 13.

In the amended petition, plaintiff claims that the Government, as supplier of asbestos, made and breached a warranty that the asbestos would be safe for its intended purpose. The Government also allegedly breached an implied warranty to use asbestos products safely to avoid injury. This warranty arose both because of the Government's control over the workplace and because of its role as promulgator of specifications and its superior knowledge of hazards. The Government's superior knowledge also allegedly created a duty to reveal that knowledge since it increased third-party plaintiff's cost of performance. The Government allegedly made and breached a warranty that compliance with its specifications would result in a safe product.

IX. *Keene Corp. v. United States*, No. 80-CIV-0401 (GLG) (S.D.N.Y., filed Jan. 22, 1980)

This suit seeking indemnification, contribution, or apportionment for amounts Keene has spent, and may be required to spend, in defending and settling thousands of personal injury

actions was filed on January 22, 1980. The underlying actions also are for injuries from exposures back to the 1930's.

The indemnification suit consisted of 23 counts, eight of which allege breach of implied warranty. Counts 2 and 15 claimed breach of warranty that asbestos supplied by the Government be safe for its intended purpose, and counts 8 and 18 asserted breach of a warranty that if the Government's specifications were complied with, satisfactory performance would result. Count 16 alleged breach of warranty to make the workplace safe, and counts 6, 10, and 17 alleged breach of warranty to use asbestos products in a safe manner.

The nine counts for negligence charged the Government with breach of duty to provide a safe workplace (counts 3 and 5), to warn of risks of exposure to asbestos (counts 4 and 9), and to design a safe product (count 7). Two broad counts included all specified negligence charges (counts 11 and 12).

Count 13 alleged strict liability for the Government's having knowingly sold a defective product.

Keene also made five claims under the Federal Employees' Compensation Act, 5 U.S.C. §§ 8101-8193 (1976) (the "FECA"). Plaintiff claimed that since the Government has limited its liability to amounts due under the FECA and recoups amounts paid under FECA from any settlements or judgments paid by plaintiff, the Government thereby is unjustly enriched (count 19); that plaintiff is due such amounts as "money had and received" (count 20); that such recoupment has increased plaintiff's costs (count 21); that the recoupment amounts to a taking of plaintiff's property without compensation (count 22); and that continuation of recoupment by the Government causes plaintiff irreparable injury for which it has no adequate remedy at law (count 23).

This suit was dismissed by the district court for pleadings inadequate to invoke FTCA jurisdiction. *Keene Corp. v. United States*, No. 80-Civ-0401 (S.D.N.Y. Sept. 30, 1981). On appeal the Second Circuit affirmed the order of dismissal. *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.1983), *cert. denied*, 464 U.S. 864, 104 S.Ct. 195, 78 L.Ed.2d 171 (1983).

X. *Keene Corp. v. United States*, No. 585-81C (Ct.Cl., filed Sept. 25, 1981)

Filed in the Court of Claims on September 25, 1981, Keene's second petition alleges a violation of plaintiff's fifth amendment rights and demands compensation for amounts paid in settlements and judgments in favor of claimants allegedly exposed to Keene's asbestos products beginning in the 1930's. Claim 1 alleges that the recoupment by the Government of amounts that it has paid to injured workers under FECA is an unconstitutional taking of Keene's property without just compensation, because the injuries to underlying plaintiffs were caused by actions of the Government. Further, such recoupments increase the amounts of judgments and settlements required to be paid by Keene. In claim 2 plaintiff charges that the FECA recoupments impair plaintiff's contract rights and thus amount to a fifth amendment taking.

XI. *GAF Corp. v. United States*, No. 83-1322 (D.D.C., filed May 6, 1983)

On May 6, 1983, GAF filed an indemnification action against the United States in the United States District Court for the District of Columbia to recover Keene's damages from 766 shipyard worker suits alleging exposure from the 1930's to the date of the suit. The suit consisted of one implied warranty count, three negligence counts, and a "summary" count alleging entitlement to indemnification.

Claims in negligence are for negligent and wrongful design of specifications for asbestos products (similar to *All Maine Asbestos* claim 5) and breach of duties to provide a safe workplace (*All Maine Asbestos* claim 6) and to reveal superior knowledge of risk of exposure to asbestos.

The warranty count alleges breach of warranty of safety, merchantability, and fitness of asbestos sold by the Government to plaintiff without warnings.

GAF's fifth count does not add breaches of duty or of warranty obligation, but, rather, states that the Government's

controlling role as the promoter of production, promulgator of specifications, seller of asbestos, and operator of shipyards rendered GAF's actions in causing injuries to plaintiffs in underlying suits passive and secondary. Therefore, GAF claims entitlement to indemnification for amounts that it has been required to pay to those underlying plaintiffs.

The case is pending in district court.

XII. *GAF v. United States*, No. 287-83C (Cl.Ct., filed May 5, 1983)

GAF's Claims Court action was filed on May 5, 1983, one day prior to its filing in the United States District Court for the District of Columbia. Although a suit for indemnification, the complaint does not specify dates of exposure alleged in the underlying suits. The complaint contains four claims in contract. Claim 1 is for breach of implied warranty of accuracy, feasibility, and safety of specifications for asbestos products that were promulgated and enforced by the Government. Claim 2 is for breach of the implied warranty of due care in using asbestos products in shipyards that were controlled by the Government. As seller of raw asbestos to GAF, the Government is charged with an implied warranty that it was safe, merchantable, and fit for its intended purpose. GAF also alleges breach of implied duty to reveal the Government's superior knowledge of the risks of exposure to asbestos.

DISCUSSION

[1] 28 U.S.C. § 1500 prevents this court from exercising subject matter jurisdiction if, as of the date an action is filed, plaintiff has pending in another federal court the same claim. The jurisdictional inquiry targets the date of filing in the Claims Court, not some subsequent date, such as the date on which the Government is made aware of the antecedent action, or the date on which the Government invokes section 1500 seeking to dismiss the Claims Court action, or the date on which the Claims Court acts. *Tecon Engr's, Inc. v. United States*, 170 Ct.Cl. 389, 395, 399, 343 F.2d 943, 946, 949 (1965), *cert. denied*, 382 U.S. 976, 85 S.Ct. 545, 15 L.Ed.2d (1966). Therefore, a plaintiff cannot cure a want of jurisdiction in

the Claims Court by voluntarily or involuntarily dismissing its parallel action, or even by suffering a court-ordered termination on the merits. This overarching principle was not acknowledged in the earlier-filed *Keene Corp.* order, in which this court indicated that circumstances might justify allowing a plaintiff to withdraw an earlier-filed action to permit the Claims Court action to proceed. *See Keene Corp.*, 12 Cl.Ct. at 216. However, the Federal Circuit gave no encouragement to allowing a subsequent cure, and the Supreme Court's intervening decision in *Christianson v. Colt Industries Operation Corp.*, 486 U.S. 800, 108 S.Ct. 2166, 2166, 2178, 100 L.Ed.2d 811 (1988), countermands it.

[2] The issues* to be resolved are 1) whether plaintiffs' Claims Court suits plead the same operative facts as do earlier-filed actions against the United States and 2) if so, as to each plaintiff, whether the earlier-filed action was pending when the Claims Court suit was filed. As to GAF, there is the separate issue of whether its later-filed case should be treated as "pending."

* Either the Federal Circuit in *Johns-Manville Corp.* or this court in *Keene Corp.*, as approved in *Johns-Manville Corp.*, has already addressed all of plaintiffs' other arguments, including: 1) that differing operative facts as between the instant non-Claims Court and Claims Court actions take these cases outside the coverage of section 1500; 2) that the existence of different underlying claimants as between the non-Claims Court and Claims Court actions takes a case outside the coverage of section 1500; 3) that differing legal theories in the non-Claims Court and Claims Court actions take a case outside the coverage of section 1500; 4) that a stay of a pre-filed non-Claims Court action takes a case outside the coverage of section 1500; 5) that a plaintiff may be given an opportunity to withdraw or secure dismissal of a pending pre-filed non-Claims Court action, and that if it then withdraws or secures dismissal of said action, section 1500 will not require dismissal of the Claims Court action; 6) that the law of the case doctrine requires denial of defendant's section 1500 motion; 7) that section 1500 does not apply when the non-Claims court action is a third-party action; and 8) that a claim in an amended complaint in the Claims Court filed after a district court action has been dismissed in whole or part does not relate back to the date on which the original complaint was filed. The court adopts defendant's analysis, including citations, of the prior treatment of issues Nos. 1-7 in its final brief. *See* Def's Br. filed Apr. 21, 1989, at 4-11. Issue No. 8 was treated in *Keene Corp.*, 12 Cl.Ct. at 210. *See also infra* note 6.

because it was filed only one day after GAF's Claims Court action.

Defendant argues that section 1500 prevents the Claims Court from exercising jurisdiction over all the actions. As to each plaintiff, it is defendant's position that jurisdiction is precluded because an earlier-filed complaint asserting the same claim or claims as pressed in the Court of Claims or Claims Court was pending in federal district court when the action was commenced here. Although plaintiffs briefed the issues individually, they argue in common that the Federal Circuit's decision in *Johns-Manville Corp.* does not reach their Claims Court actions on the basis that no pending action on the same claim or claims now exists.

The Federal Circuit approached the first issue, as had this court, by analyzing the operative facts cited in the earlier-filed and Claims Court actions, respectively, to ascertain whether there is present the requisite homogeneity of operative facts to constitute the same claim. See 855 F.2d at 1559.

All complaints in other courts and the Claims Court cases seek recovery for costs and expenses incurred and other damages engendered by suits brought by shipyard workers against plaintiffs alleging injury from exposure to asbestos or asbestos products. The complaints or third-party complaints of each plaintiff filed in district court and each plaintiff's Claims Court action are framed upon a homogeneity of operative facts, including some or all of the following:

- the Government's specifications required asbestos in the insulation products;
- plaintiffs were compelled to perform the supply contracts with the Government;
- the Government controlled the shipyard working conditions;
- the Government restricted access to the shipyards;
- the Government impliedly agreed not to hold plaintiffs liable for damages, provided that the asbestos products were made according to the specifications;

- the Government had a duty to develop and, once adopted, to enforce its standards for limiting exposure to asbestos or asbestos products;
- the Government had a duty to disclose its knowledge of the shipyard working conditions;
- the Government knew of the dangers of exposure to asbestos and asbestos products;
- the Government failed to disclose information regarding shipyard working conditions;
- plaintiffs are not liable for acts of omissions of the Government.

It is concluded, therefore, that all the prior-filed complaints and GAF's complaint constitute suits on the same claims as plaintiffs' claims filed in the Court of Claims and later in the Claims Court.

[3] Plaintiffs, other than GAF, argue vigorously that their earlier-filed actions were not pending for purposes of barring the Claims Court from taking jurisdiction over their complaints, because the earlier actions were stayed or had been dismissed voluntarily or involuntarily when the matter came before the court on defendant's February 27, 1987 motion or now, *i.e.*, the date on which this court acts on defendant's motion. The Federal Circuit's opinion does not support putting a gloss on "pending" actions such as to exclude stayed, suspended, or otherwise inactive cases. *Johns-Manville Corp.*, 855 F.2d at 1567; see *supra* note 4. The Court of Claims in *British American Tobacco Co. v. United States*, 89 Ct.Cl. 438 (1939), *cert. denied*, 310 U.S. 627, 60 S.Ct. 974, 84 L.Ed. 1398 (1940), dismissed an action under the predecessor to section 1500 even though the simultaneously-filed suit had been terminated by that time. Moreover, *Tecon Engineers* fixed the jurisdictional event as the date the action was filed in the Court of Claims or Claims Court. "The words 'shall not have jurisdiction' pertain solely to the acquiring or taking of jurisdiction by this court when the same plaintiff *already* 'has pending in any other court'

another suit on the same claim . . . " 170 Ct.Cl. at 395, 343 F.2d at 946 (emphasis in original).⁸

The court has recognized at least one situation in which an earlier-filed action will not preclude maintaining an action in the Claims Court. In *National Steel & Shipbuilding Co. v. United States*, 8 Cl.Ct. 274 (1985), as a result of questioning its jurisdiction to proceed, a federal district court required plaintiff to file a subsequent identical action in the Claims Court. This court wrote:

The Government here concedes that jurisdiction lies over plaintiffs' complaint in the district court, although the contrary was urged to Judge Neilsen. The Government takes the position now that the jurisdiction reposed in the district court and the Claims Court is not concurrent, because only this court can consider claims based on an implied-in-fact contract. It is not decided whether such a contract has been established. However, if this court's exercise of jurisdiction turned on such a determination, plaintiffs would be whipsawed — which Congress manifestly did not intend — by exercising their prerogative to file a lawsuit in district court only

⁸ The principal prior-filed district court action in *Johns-Manville Corp.* had been stayed informally at the time that this court alerted the parties to the problem of section 1500. Therefore, both this court's *Keene Corp.* order and the Federal Circuit's *Johns-Manville Corp.* opinion considered the applicability of section 1500 in the circumstance of an earlier-filed district court suit still pending, albeit stayed. However, the construction of section 1500 that emerges from the Federal Circuit's opinion and this court's order is that section 1500 is applicable as of the date an action is filed in the Claims Court: "The purpose of section 1500 is to prohibit the filing and prosecution of the same claims against the United States in two courts at the same time." *Johns-Manville Corp.*, 855 F.2d at 1562 (citation omitted); see also *Keene Corp.*, 12 Cl.Ct. at 206, 207, 212 n. 9. (In the third citation this court referred to section 1500 as prohibiting "the maintenance of an action in the Claims Court if an action on the same operative facts is pending elsewhere." The word "maintenance" was intended to signify exercise of jurisdiction consistent with the references at pp. 206 and 207.)

to be met with the objection that the claim is really one based on an implied-in-fact contract, which lies exclusively within the jurisdiction of this court, and then met in this court (assuming the district court action had been dismissed) with the argument that jurisdiction was lacking due to the failure to prove a contract implied in fact.

8 Cl.Ct. at 275. This court invoked 28 U.S.C. § 1500 to dismiss the Claims Court action. However, if the district court were to resist jurisdiction, the action was allowed to be reinstated. *Id.* at 276.

This result is not unlike the Federal Circuit's approach in *Boston Five Cents Savings Bank, FSB v. United States*, 864 F.2d 137 (Fed.Cir.), *rev'g*, 14 Cl.Ct. 217 (1988), a decision issued several months following *Johns-Manville Corp.* Prior to filing in the Claims Court, plaintiff had tried to assert a money claim in its pending district court action by amendment, but was unsuccessful. The appeals court concluded that the failed amendment did not constitute a pending claim. It also was held that the Claims Court had jurisdiction of a contract claim for money, over which it had exclusive jurisdiction, even though plaintiff had filed an identical claim on the same day in district court. The Federal Circuit held that the Claims Court should have retained jurisdiction by way of suspension pending resolution of the earlier-filed district court complaint for declaratory relief based on the same operative facts. The Federal Circuit relied on *Hossein v. United States*, 218 Ct.Cl. 727 (1978), in reversing the dismissal of the Claims Court action. In *Hossein* the Court of Claims had ruled that section 1500 was inapplicable to a suit in contract for money damages over which the court had exclusive jurisdiction when an identical contract action had been filed contemporaneously in district court. The premise of *Boston Five Cents Savings Bank*, the most recent decision applying section 1500, was that dismissal of a claim based on the same operative facts is not justified if the Claims Court should know that jurisdiction belongs exclusively in the Claims Court. *Accord Brown v. United States*, 175 Ct.Cl. 343, 358 F.2d 1002 (1966) (because district court lacked jurisdiction over

plaintiffs' money claim, but had jurisdiction over their equitable claim, Court of Claims reinstated the previously dismissed money claim once district court had dismissed it); *Casman v. United States*, 135 Ct.Cl. 647 (1956) (equitable relief sought in district court did not deprive Court of Claims of jurisdiction over money claim).

[4.5] The approach of this court in *National Steel* and that of the Federal Circuit in *Boston Five Cents Savings Bank* must be tempered with the knowledge that they can defeat the purpose of 28 U.S.C. § 1500 if the litigation to perfect jurisdiction in the federal district court is time-consuming, extensive, and costly. Nonetheless, the Federal Circuit in *Boston Five Cents Savings Bank* adopted a case-by-case analysis to ascertain whether the prior-filed district court action should bar a later Claims Court action, and Keene's petition, No. 579-79C filed in the Court of Claims on December 21, 1979, after it had filed a third-party complaint against the United States in *Miller*, commends this type of analysis.⁶

Keene's third-party claim against the Government in *Miller* has been extinguished for nine years. It was filed on June 1, 1979. Keene alleges that local counsel was not authorized to file the May 9, 1979 motion to file the third-party complaint. This assertion is unsupported by affidavit as required by RUSCC Appendix H ¶ 1. See *Cedar Lumber, Inc. v. United States*, 857 F.2d 765, 769 (Fed.Cir.1988). Argument of counsel does not

⁶ Keene argues that filing its amended complaint with the Court of Claims in No. 579-79C after the dismissal of the third-party complaint in *Miller* cures any jurisdictional defect. This argument was rejected in *Keene Corp.*, 12 Ct.Cl. at 210. See *supra* note 4. As defendant argues, if the factual predicate for jurisdiction existed at the time an action originally was brought, an amendment is permitted by 28 U.S.C. § 1653 (1982), to cure a deficient pleading. See *Mathews v. Diaz*, 426 U.S. 67, 75 & n. 9, 96 S.Ct. 1883, 1889 & n. 9, 48 L.Ed.2d 478 (1976). However, an amended complaint cannot cure a jurisdictional defect, i.e., to effect the removal of the pendency at the time the Claims Court action is commenced of an earlier-filed, but subsequently dismissed, action on the same operative facts. See *Reynolds v. United States*, 748 F.2d 291, 293 (5th Cir.1984) (amended complaint under the Federal Tort Claims Act dismissed as relating back to original filing date on which no subject matter jurisdiction existed because administrative remedy was not exhausted).

substitute for averments in an affidavit. *Levi Strauss & Co. v. Genesco, Inc.*, 742 F.2d 1401, 1404 (Fed.Cir.1984). However, Keene's April 23, 1980 motion to dismiss its third-party complaint against the United States in *Miller* pleads that "Keene Building Products Corporation has instituted an action in the Court of Claims against the United States of America which should resolve the differences between the parties." Therefore, Keene has established that the complaint was withdrawn voluntarily.

This court, fully advised by Keene's persuasive arguments, nonetheless concludes that 28 U.S.C. § 1500 deprived the Court of Claims of jurisdiction when its petition was filed, even though Keene voluntarily withdrew the third-party complaint within one year. Were the result otherwise, the precedent would devour the rule. Assuming that a plaintiff could establish that an action within the jurisdiction of another court against the United States was unauthorized (which Keene failed to do in the case at bar), the Claims Court would be required to examine all the litigation activity for one year (or perhaps longer) to ascertain if the Government was engaged sufficiently so that a plaintiff should not be allowed to defer to the Claims Court. The result may seem harsh, but the Supreme Court long ago acknowledged that, given the plain meaning of the statute, a court is "not at liberty to add an exception in order to remove apparent hardship in particular cases." *Corona Coal Co. v. United States*, 263 U.S. 537, 540, 44 S.Ct. 156, 68 L.Ed. 431 (1924) (citations omitted). Application of section 1500 does not call for examining the record of the district court in this manner. Suffice it to say that Keene's situation in respect of *Miller* is not *National Steel* or *Boston Five Cents Savings Bank*.

[6] GAF's complaint was filed one day after its complaint had been accepted for filing by the Claims Court. *Tecon Engineers* ruled that Section 1500 does not apply to such actions. 170 Ct.Cl. 389, 343 F.2d 943. Counsel for GAF ably has demonstrated that language in *Tecon Engineers*, 170 Ct.Cl. at 400-01 & nn. 4, 7, 343 F.2d at 950 & nn. 4, 7, concerning "simultaneously" filed actions does not exclude an action filed

in federal district court one day after an action was commenced in the Court of Claims from coming within *Tecon's* safe harbor.⁷

This court has concluded that a proper application of the canons of statutory construction in light of the purpose of section 1500 calls for a reexamination of *Tecon Engineers*. See *Keene Corp.*, 12 Cl.Ct. 205-07, 212-16. *Keene Corp.* took the position that section 1500 by its express language applies to actions on the same claim whether filed before or after a plaintiff institutes a Claims Court complaint. Thus the purpose of the statute – to conserve the Government's litigation resources by forcing a plaintiff to forego the Claims Court as a forum if it elects to have the Government defend in other courts – only is served by invoking the bar to jurisdiction irrespective of when a plaintiff initiates its suit in the Claims Court – before or after another suit on the same claim. Similarly, Congress has established that a later-filed claim for refund in the United States Tax Court can deprive a federal district court or the Claims Court of jurisdiction to the extent that it has been acquired. 26 U.S.C. § 7422(e) (1982). Although this court agrees with GAF's argument that *Tecon* created a jurisdictional bright line, i.e., section 1500 does not reach a suit filed one day following commencement of a Claims Court action, the *Tecon* rule does not comport with the purpose of section 1500. Nonetheless, *Tecon Engineers* is binding precedent on this court.⁸

⁷ *Tecon Engineers* discussed, but did not overrule, *Hobbs v. United States*, 168 Ct.Cl. 646 (1964) (per curiam). In *Hobbs* plaintiff filed a petition for review of an administrative decision in a federal appeals court one day after commencing his action on the same operative facts in the Court of Claims. The Court of Claims construed section 1500 as "clearly depriv[ing] this court of jurisdiction." 168 Ct.Cl. at 647. As this court noted in *Keene Corp.*, 12 Cl.Ct. at 207, the Court of Claims in *Tecon Engineers* suggested that suits filed simultaneously with Court of Claims actions were subject to section 1500, although it did not go so far as to say whether an interval of one day constituted a "simultaneous" filing.

⁸ Assuming, *arguendo*, that *Keene's* voluntary withdrawal of its third-party complaint in *Miller* removed the bar to maintaining No. 579-79C in the Court of Claims as of December 21, 1979, the date of filing, section 1500 might bar its action if the rule in *Tecon Engineers* were overturned. *Keene's* complaint against the United States in *Keene Corp. v. United States*, No. 80 Civ. 0401 (S.D.N.Y., filed Jan. 22, 1980), is a later-filed case based on the same operative facts.

CONCLUSION

Defendant's motion is granted except as to GAF, Nos. 287-83C. The Clerk of the Court shall dismiss the complaints or amended complaints in Nos. 579-79C, 585-81C, 170-83C, 16-84C, 514-84C, 515-85C, and 12-88C for lack of subject matter jurisdiction.

IT IS SO ORDERED.

ORDER

[7] UNR filed its Petition for Partial Reconsideration on June 14, 1989, requesting revision of language in this court's opinion filed in *Keene Corp., et al. v. United States*, Nos. 579-79C, 585-81C, 170-83C, 287-83C, 16-84C, 514-84C, 515-85C & 12-88C (Cl.Ct. June 1, 1989). Defendant responded this date, stating that it does not interpose any objection to the relief requested.

UNR is correct that its "Amended List of Actions by UNR Industries, Inc., et al., Against the United States, Etc.," filed on November 8, 1989, represented in footnotes that UNR had filed notices of dismissal of its third-party claims against the United States brought by Model Third Party Complaints A and B in the *In re All Maine Asbestos Litigation*. However, before including procedural history not supported by documents of record, this court was obligated to verify the facts with the courts involved. The Clerk's Office for the District of Maine advised that all legal proceedings in that court involving UNR continued to be stayed. Apparently, the recordation of the voluntary dismissal was overlooked since it had not been affirmatively acted upon by that court.

In response to UNR's petition for partial reconsideration, the District of Maine was again contacted, and the recordation of a voluntary dismissal of UNR's third-party actions on October 20, 1988, was confirmed. Accordingly,

IT IS ORDERED, as follows:

Plaintiffs' motion for partial reconsideration is granted.*

* The portions of this Order amending the original opinion are incorporated therein.

APPENDIX F

IN THE
UNITED STATES COURT OF CLAIMS

No.
585-81 C

KEENE CORPORATION, Plaintiff

v.

THE UNITED STATES OF AMERICA, Defendant

PETITION

TO THE HONORABLE, THE CHIEF JUDGE
AND THE JUDGES OF THE UNITED STATES
COURT OF CLAIMS:

Plaintiff respectfully alleges as follows:

Nature of the Claim

1. Plaintiff seeks just compensation under the Fifth Amendment to the United States Constitution and Article I, Section 10 thereof for unconstitutional takings of plaintiff's property by the defendant without due process of law and without just compensation. The taking started in or about 1975 and has continued through the date of this Petition. Plaintiff believes that it will continue for the foreseeable future.

Jurisdiction

2. Jurisdiction of the Court is invoked pursuant to the Tucker Act, 28 U.S.C. Section 1491 (1970), as amended.

Keene's Identity

3. Plaintiff Keene Corporation ("Keene") is a corporation organized under the laws of the State of New York and has its principal place of business at 200 Park Avenue, New York, New York.

4. In February 1968, Keene acquired substantially all of the outstanding stock of Baldwin-Ehret-Hill, Inc. ("B-E-H"), making B-E-H a subsidiary of Keene.

5. B-E-H was a Pennsylvania corporation formed in 1959 as a result of the statutory merger of Ehret Magnesia Manufacturing company ("Ehret"), which had been formed in 1899, and Baldwin-Hill Company, which had been formed in 1935. B-E-H and its predecessors, Ehret and Baldwin-Hill, manufactured and sold thermal insulation products, some of which contained asbestos fibers.

6. B-E-H was operated as a Keene subsidiary until January 1970, when B-E-H and Keene Building Products Corporation ("KBPC"), a Delaware corporation and wholly-owned subsidiary of Keene, were merged. KBPC continued to operate the businesses of B-E-H as a subsidiary of Keene.

7. On October 8, 1974, by duly executed corporate resolutions, KBPC transferred "all of its assets and liabilities" relating to thermal insulation products to Keene. Thereafter, on the same date, the stock of KBPC was sold to a third party, and KBPC ceased to be a subsidiary of Keene. The assets acquired by Keene from KBPC were thereafter operated by Keene as a division known as the Keene Insulation and Contracting Division. In 1975 and 1976, the contracting operations and all but one manufacturing plant of the Keene Insulation and Contracting Division were sold or closed. Keene, apart from its former subsidiary, has never made nor sold and does not now make nor sell any thermal insulation products containing asbestos.

Keene's Damages

8. More than 8,000 law suits have been commenced against Keene, KBPC or its predecessors by persons (hereinafter referred

to as "claimants") alleging personal injury or death from inhalation of asbestos fibers contained in thermal insulation products allegedly manufactured or sold by B-E-H, KBPC or their predecessors.

9. Keene has denied and continues to deny the allegations of all complaints which seek to impose upon it damages as a result of the sale or use of products containing asbestos fibers. Notwithstanding such denials, Keene has been held legally liable to claimants for their damages and has been compelled to enter into settlements in appropriate cases. Certain monies paid by Keene in judgments or settlements as described above have been unjustly taken by the defendant as alleged herein.

10. Keene's claims in this action arose after October 8, 1974, the date of the transfer of assets and liabilities to Keene as set forth in paragraph 7 above.

11. Keene is and always has been the sole owner of the claims asserted herein, and Keene is entitled to recover the amount claimed from the defendant.

12. No action has been taken on Keene's claim by Congress or by any department of the Government or in any judicial proceeding.

The Nature of the Third Party Claims Against Keene

13. In the actions against Keene which seek to impose damages upon Keene as successor to KBPC and its predecessors as a result of the sale or use of products containing asbestos, the claimants have alleged exposure to asbestos fibers commencing as early as the mid-1930's.

14. Most of the claimants were involved in installing high temperature thermal insulation around pipes and boilers on naval ships, in power plants and in other industrial and commercial plants, including refineries.

15. Most of the claimants engaged in the installation of thermal insulation on naval vessels were either employees of the defendant, working in U.S. naval shipyards, or were employees working in private shipyard under contract to the U.S. Navy, an agency of the United States.

Relationship Between Keene and the Defendant

16. At the times relevant herein, defendant United States of America owned and operated naval shipyards for the construction and repair of its naval vessels. Numerous claimants were employed by the defendant in its naval shipyards when they incurred their alleged injuries.

17. At the times relevant herein, defendant also utilized private shipyards for the construction and repair of its naval vessels (hereinafter "contract shipyards"), in which various claimants were employed when they incurred their alleged injuries.

18. In both its own naval shipyards and in its contract shipyards, defendant supervised and regulated the labor practices of the workers employed therein and determined and specified the manner and application of products containing asbestos on its naval vessels.

19. Defendant promulgated health standards and minimum safety requirements for both its own shipyards and its contract shipyards and conducted industrial health inspections of such shipyards for the purpose of determining the existence of any safety hazards therein.

20. At all relevant times herein, defendant promulgated specifications requiring the inclusion of asbestos fiber in thermal insulation products to be purchased by its naval shipyards, or its contract shipyards, for use in defendant's naval vessels.

21. At all times relevant herein, defendant promulgated specifications requiring the inclusion of asbestos fiber in thermal insulation products to be purchased by defendant, or by

private parties, for use in projects funded by defendant in whole or in part, or otherwise subject to defendant's control and regulation, on which projects claimant were employed.

22. KBPC and its predecessors were approved suppliers to defendant of thermal insulation containing asbestos that conformed to defendant's specifications. Pursuant to express contracts, KBPC and its predecessors sold such insulation for use by or for the benefit of the defendant.

Factual and Historical Allegations

23. The allegations set forth in paragraphs 24 through 48 below were for the most part unknown to Keene and KBPC and its predecessors until after the proceedings alleged herein had been initiated by the claimants.

24. At all times relevant herein, defendant had superior knowledge of the hazards to insulation workers employed in its naval shipyards from exposure to asbestos dust and was conducting x-ray examinations of the lungs of such workers for evidence of asbestosis. These x-rays revealed peripheral lung markings which increased over time. Defendant further knew that the danger could be controlled by maintaining a modest level of exposure to asbestos fibers.

25. At all times relevant herein, defendant also had superior knowledge that existing safety and health standards were being violated in its U.S. Naval and contract shipyards.

26. In 1942, the American Conference of Governmental Industrial Hygienists, a quasi-official body responsible for making recommendations concerning industrial hygiene, adopted the 5 million particles per cubic foot ("p.p.c.f.") threshold limit value ("TLV") for asbestos fibers.

27. Some time prior to December 1942, the U.S. Maritime Commission, an agency of the defendant, and the U.S. Navy concurred that too little attention had been paid to matters involving the health and safety of shipyard employees and decided

to conduct a survey for the purpose of developing standards to govern the health of shipyard employees throughout the United States. Dr. Phillip Drinker of the Department of Industrial Hygiene, School of Public Health, Harvard University, and representatives of the U.S. Navy Bureau of Medicine and Surgery toured shipyards throughout the United States for the purpose of presenting to the shipyard industry, including the U.S. Navy, minimum standards for the protection of the health of shipyard employees.

28. In or about December 1942, as a result of the tour by Dr. Drinker and his Government associates, the defendant determined *inter alia*, that:

(a) asbestosis had occurred in shipyards utilized for the construction or refitting of defendant's naval vessels and was likely to occur again because asbestos was being handled with little or no precaution by insulation workers;

(b) the preventative programs then employed in such shipyards had been ineffective; and

(c) the health effects of asbestos could be controlled by enforcing appropriate ventilation standards in conjunction with mandatory, periodic examinations of shipyard employees.

29. In February 1943, the U.S. Navy and the U.S. Maritime Commission promulgated "Minimum Requirements for Safety and Health in Contract Shipyards." This report specifically identified asbestosis as a hazard of any operation which gave rise to asbestos dust but asserted that such operations could be performed safely by isolating them, providing ventilation, requiring the operators to wear respirators, and conducting periodic medical examinations.

30. Pursuant to the report referred to in No. 30 above, each shipyard holding contracts with the U.S. Navy and Maritime Commission was given notice that the Maritime Commission would make available safety and industrial health consultants charged with the coordination and supervision of the safety and

health programs of the two agencies and that each such shipyard was to cooperate with the assigned consultants and to comply fully with the promulgated minimum standards.

31. During the Second World War and immediately thereafter, despite the issuance of the Minimum Requirements, the problem of inhalation of asbestos dust was given low priority by defendant, and the operational control of occupational health hazards varied from shipyard to shipyard.

32. During the Second World War neither the U.S. Navy nor the U.S. Maritime Commission enforced its minimum safety and health requirements. This knowing failure to enforce such standards carried over into the postwar era.

33. In or about 1945, a study was conducted by health consultants from the U.S. Navy and Maritime Commission which represented, contrary to the defendant's superior knowledge, that in both government and contract shipyards thermal insulation workers were not engaged in a dangerous occupation.

34. During the early 1950's and thereafter, considerable ship construction and modernization was undertaken in both U.S. Navy and contract shipyards, resulting in extensive worker exposure to asbestos dust including exposures in excess of the governing TLV's. During this period, defendant took few, if any, precautions on behalf of the insulation workers.

35. In 1965, an epidemiological study of asbestosis among insulation workers in the United States was undertaken. Evidence of pulmonary asbestosis was found in almost half the workers examined. Abnormalities were found in over ninety percent of the workers with more than forty years work experience. This study concluded that the installation of thermal insulation containing asbestos was a hazardous occupation.

36. In 1968, the American Conference of Governmental Industrial Hygienists determined that the TLV for asbestos dust should be reduced to 2 million p.p.c.f.

37. In February 1969, the Chief of the Navy's Bureau of Medicine and Surgery advised the Chief of Naval Operations that reports from U.S. Naval shipyards indicated continuing problems concerning the control of airborne asbestos and recommended that the industrial hygiene sections of the shipyards conduct surveys for the purpose of evaluating the effectiveness of ventilation control and respiratory protective devices.

38. Later in 1969, an internal U.S. Navy survey of both government and contract shipyards indicated that, in every instance, yard management was aware of the hazards attending the use of asbestos insulating materials but had failed to exercise sufficient care necessary to abate the problem.

39. During 1971 and 1972 dust counts at the Pearl Harbor Naval Shipyard and the Long Beach Naval Shipyard continued to reveal asbestos dust levels well in excess of the current TLV.

40. In 1972, the National Institute for Occupational Safety and Health adopted a new TLV in connection with the Occupational Safety and Health Act of 1970 ("OSHA"). Under this new standard, which was also adopted by the U.S. Navy, exposures were limited to 2 asbestos fibers per cubic centimeter of air, based upon a count of fibers greater than 5 micrometers in length. Peak concentrations were not to exceed 10 fibers per cubic centimeter.

41. At the times relevant herein, dust counts at the defendant's U.S. Naval and contract shipyards revealed asbestos dust levels far in excess of the governing TLV.

42. Throughout the period 1947 and thereafter, the defendant shipyards, as well as contract shipyards, incurred numerous cases of asbestosis and other harmful conditions.

43. Defendant failed to disclose to KBPC and its predecessors its superior knowledge of the allegedly harmful character of asbestos fibers and the improper manner in which asbestos-containing thermal insulation was being utilized and installed in facilities subject to its control and regulation in violation of

its own health and safety standards. Despite this knowledge, defendant continued to specify the inclusion of asbestos in thermal insulation for use by or for the benefit of defendant.

44. Defendant's programs to prevent asbestosis and other harmful conditions among insulation workers in facilities subject to its control and regulation were inadequate or unenforced.

45. During the times relevant herein defendant had the duty to protect workers, including claimants, employed in facilities subject to its control and regulation, from asbestosis and other harmful conditions, but failed to exercise a sufficient degree of care to do so.

46. As a result of defendant's negligent or wrongful conduct numerous claimants have been injured.

PLAINTIFF'S FIRST CLAIM FOR RELIEF

47. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 47 inclusive.

48. Defendant asserts that its liability to claimants who were Government employees is limited to the compensation payable under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. §§ 8101-8193. Defendant has refused to make any payments to such claimants other than the amounts which it claims it has paid as FECA benefits.

49. Notwithstanding its claim that it has paid FECA benefits to claimants, defendant has recouped and will continue to recoup, under 5 U.S.C. §8132, the amounts of FECA benefits it has paid to such claimants out of judgments and settlements which Keene has paid to the same claimants.

50. By recovering money paid by Keene to claimants, defendant has relieved itself of any responsibility for compensating claimants who were Government employees for their alleged injuries, notwithstanding defendant's conduct in causing those very injuries.

51. Since defendant's conduct caused the alleged injuries which have resulted in settlements and judgments which Keene has paid to claimants, Keene is unconstitutionally deprived of property, and the defendant is unjustly enriched, by the defendant's retention of monies paid to claimants by Keene and refunded to defendant under FECA, 5 U.S.C. § 8132, and under related regulations, 20 C.F.R. § 10.503.

52. Defendant's recoupment of FECA benefits out of judgments and settlements paid by Keene to the same claimants is a direct and proximate cause of damages and injury suffered by Keene, because the amount of the underlying claims against Keene are increased by the amount of the FECA payments to be recouped by the defendant, thus increasing the cost to Keene of related settlements and judgments.

53. Defendant's recoupment of FECA benefits as herein set forth constitutes a taking of Keene's property without due process of law and without just compensation in violation of Keene's rights under the Fifth Amendment to the Constitution of the United States.

54. By reason of the foregoing, defendant is liable to Keene for the amounts of money that defendant has recouped from claimants out of judgments and settlements paid by Keene to the same claimants.

PLAINTIFF'S SECOND CLAIM FOR RELIEF

55. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 55 inclusive.

56. Defendant's recoupment of FECA benefits as set forth herein constitutes an impairment of Keene's contract rights without due process of law in violation of Keene's rights secured by the Fifth Amendment to the Constitution of the United States and Article I, Section 10 thereof.

57. By reason of the foregoing, defendant is liable to Keene for the amounts of money that defendant has recouped from

claimants out of judgments and settlements paid by Keene to the same claimants.

WHEREFORE, plaintiff demands judgment for the following relief:

1. That the Court enter judgment against defendant for the unconstitutional acts described above in an amount to be determined.

2. That the Court order an accounting to determine the amounts in which plaintiff has been damaged by defendant.

3. That the Court grant such other and further relief as it deems just and proper.

Respectfully submitted,

Paul C. Warnke

CLIFFORD & WARNKE
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(212) 828-4200

~ Attorney for Plaintiff

Dated: Washington, D.C.
September 25, 1981

Of Counsel:

Harold D. Murry, Jr.
Don Scott DeAmicis
Clifford & Warnke
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 828-4200

-and-

Jerold Oshinsky
Anderson Baker Kill & Olick
1800 K Street, N.W.
Washington, D.C. 20006
(202) 466-7814

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELSIE MILLER, personal :
representative of the Estate :
of Ada M. Dzon, Deceased, :
 :
Plaintiff, :
 : Civil Action No.
vs. : 78-1283
 :

JOHNS MANVILLE PRODUCTS :
CORPORATION, et al., :
 :
Defendants and :
Third-Party Plaintiff, :
 :

vs. :
 :
UNITED STATES GOVERNMENT :
and DRAVO CORPORATION, :
 :
Third-Party Defendants. :
 :

MOTION FOR VOLUNTARY DISMISSAL OF
CLAIM AGAINST THIRD-PARTY DEFENDANT
UNITED STATES OF AMERICA

AND NOW comes the defendant and third-party plaintiff, Keene Building Products Corporation, by its attorneys, KYLE AND EHRMAN, and respectfully requests that its claim against the third-party defendant, United States of America, be voluntarily dismissed without prejudice and assigns the following reasons:

1. That Keene Building Products Corporation has entered into a Joint Tort Release Agreement with the plaintiff.

2. That under the facts and circumstances of the case, it would not be economically or judicially feasible to proceed with the action at this time against the United States of America.

3. That Keene Building Products Corporation has instituted an action in the Court of Claims against the United States of America which should resolve the differences between the parties.

WHEREFORE, this defendant and third-party plaintiff respectfully requests that the action against the United States of America be voluntarily dismissed without prejudice.

Respectfully submitted,

KYLE AND EHRMAN

BY /s/
Attorneys for Defendant and
Third-Party Plaintiff, Keene
Building Products Corporation.

ORDER OF COURT

AND NOW, to-wit, this _____ day of _____, 1980, the defendant and third-party plaintiff, Keene Building Products Corporation, having filed a Motion for Leave to Voluntarily Dismiss its third-party claim against the United States;

IT IS ORDERED that the Motion be and the same hereby is granted and the action is hereby dismissed without prejudice.

By the Court

APPENDIX II

IN THE
UNITED STATES COURT OF CLAIMS

No.
579-79 C

KEENE CORPORATION, Plaintiff

v.

THE UNITED STATES OF AMERICA, Defendant

PETITION

(Filed:

TO THE HONORABLE, THE CHIEF JUDGE
AND THE JUDGES OF THE UNITED STATES
COURT OF CLAIMS:

Plaintiff respectfully alleges as follows:

COUNT I

Nature of the Claim

1. This petition seeks damages against the United States of America for indemnity, contribution and/or apportionment arising from express and implied contracts between said defendant and Keene Building Products Corporation (a former subsidiary of plaintiff Keene Corporation) and its predecessors.

Keene's Identity

2. Plaintiff Keene Corporation ("Keene") is presently a corporation organized under the laws of Delaware and has its principal place of business at 200 Park Avenue, New York, New York. As of January 1, 1980, Keene will be a corporation organized under the laws of New York.

3. Keene brings this action under the general jurisdiction of the Court, 28 U.S.C. Section 1491 (1970).

4. Ehret Magnesia Manufacturing Company ("Ehret") was formed in Pennsylvania in 1899 under the name Asbestos Manufacturing Company and subsequently changed its name to Ehret. Baldwin-Hill Company was formed in New Jersey in 1935. Baldwin-Ehret-Hill, Inc. ("B-E-H") was a Pennsylvania corporation formed in 1959 as a result of the statutory merger of Ehret and Baldwin-Hill Company. Pursuant to Title 15 §1907 of Pennsylvania Statutes Annotated and Title 14:12-5 of the Revised Statutes of New Jersey, then applicable, the rights, powers and privileges of the merged corporations vested in B-E-H, the successor corporation. B-E-H and its predecessors, Ehret and Baldwin-Hill, manufactured and sold thermal insulation products some of which contained asbestos fibers.

5. In February 1968, Keene acquired substantially all of the outstanding stock of B-E-H, making B-E-H a subsidiary of Keene. B-E-H was operated as a Keene subsidiary until 1970.

6. In January 1970, there was a statutory merger between B-E-H and a wholly-owned subsidiary of Keene named Keene Building Products Corporation ("KBPC"). KBPC continued to operate the businesses of B-E-H as a subsidiary of Keene. Pursuant to Title 15 §1907 of Pennsylvania Statutes Annotated and Title 8 §259 of Delaware Code Annotated, then applicable, the rights, powers and privileges of the merged corporations vested in KBPC, the successor corporation.

7. In October 1974, KBPC transferred a substantial portion of its assets and liabilities to Keene. The transferred liabilities included only those which were known and which related to the manufacture and installation of thermal insulation products. Those retained by KBPC related to the manufacture of certain noise control products and had nothing whatsoever to do with insulation products. Subsequent to the transfer of assets and liabilities but still in October 1974, the stock of KBPC was sold to a third party, KBPC thus ceasing to be a subsidiary of Keene.

The assets acquired by Keene from KBPC were thereafter operated by Keene as a division known as the Keene Insulation and Contracting Division. In 1975 and 1976, the contracting operations and all but one manufacturing plant of the Keene Insulation and Contracting Division were sold or closed. Keene, apart from its subsidiary, has never and does not now make nor sell any thermal insulation products containing asbestos.

Keene's Injury

8. More than 2,500 law suits have been commenced against Keene, KBPC and/or its predecessors by persons alleging personal injury or death from inhalation of asbestos fibers contained in thermal insulation products allegedly manufactured or sold by B-E-H or KBPC, or their predecessors.

9. Keene has denied and continues to deny the allegations of all complaints which seek to impose upon it damages as a result of the sale or use of products containing asbestos fibers. Notwithstanding such denial, a court may nevertheless impose liability upon Keene and because of the very expensive, uncertain and time-consuming nature of litigation, Keene has been compelled to enter and will continue to enter into reasonable settlements in appropriate cases. In addition, as a result of such actions, Keene has and will continue to incur expenses, including increased expenses relating to insurance coverage, and has and will be compelled to pay reasonable sums to defend such actions.

10. Keene is and always has been the sole owner of the claims asserted herein and Keene is justly entitled to recover the amount claimed from the defendant.

11. No action is now pending on Keene's claim by Congress or by any department of the Government or in any judicial proceeding other than as set forth herein.

The Nature of the Third Party Claims Against Keene

12. In these actions the plaintiffs (hereinafter referred to as the "claimants") have alleged exposure to asbestos fibers over

their work histories commencing as early as the mid-1930's.

13. Most of the claimants were involved in installing high temperature thermal insulation around pipes and boilers, naval ships, power plants and other industrial and commercial plants, including refineries.

14. Most of the claimants engaged in the installation of thermal insulation on naval vessels were either employees of the defendant working in U.S. naval shipyards, or were employees working in private shipyards under contract to the U.S. Navy, an agency of the United States.

15. In the actions against Keene the complaints have typically alleged that:

(a) the claimant worked with or around thermal insulation products containing asbestos;

(b) in the course of his work the claimant cut asbestos-containing thermal insulation with a saw or a knife, ripped out old asbestos-containing thermal insulation preparatory to installing new such insulation, and/or mixed asbestos-containing cement prior to application;

(c) all of the foregoing activities created air-borne dust, containing asbestos fibers;

(d) the claimant inhaled such dust; and

(e) such inhalation caused asbestosis or other harmful conditions.

Relationship Between Keene and the Defendant

16. At the times relevant herein, defendant United States of America owned and operated naval shipyards for the construction and repair of its naval vessels, in which various claimants were employed at times that they were incurring their alleged injuries.

17. At the times relevant herein, defendant also utilized private shipyards for the construction and repair of its naval vessels, (hereinafter "contract shipyards") in which various claimants were employed at times that they were incurring their alleged injuries.

18. In both its own naval shipyards and in its contract shipyards, defendant supervised and regulated the labor practices of the workers employed therein and determined and specified the manner and application of products containing asbestos in its naval vessels.

19. Defendant promulgated health standards and minimum safety requirements for both its own shipyards and its contract shipyards and conducted industrial health inspections of such shipyards for the purpose of determining the existence of any safety hazards therein.

20. At all relevant times defendant promulgated specifications requiring the inclusion of asbestos fiber in thermal insulation products to be purchased by its naval shipyards, or its contract shipyards, for use in its naval vessels.

21. At times relevant herein, defendant promulgated specifications requiring the inclusion of asbestos fiber in thermal insulation products to be purchased by defendant, or by private parties, for use in projects funded by defendant in whole or in part, or otherwise subject to defendant's control and regulation, on which claimants may have been employed.

22. As used herein, the term "control" shall be given its usual and accepted meaning, including but not limited to the circumstance, that if defendant could require the use of asbestos-containing thermal insulation at any facility, that facility was subject to defendant's control.

23. At times relevant herein, defendant sold to KBPC and its predecessors asbestos fiber.

24. KBPC and its predecessors incorporated this asbestos fiber purchased from defendant into certain of their thermal

insulation products without any alteration of such asbestos, or in any way changing its characteristics.

25. At times relevant herein, KBPC and its predecessors sold their thermal insulation products incorporating asbestos fiber purchased from the defendant, to defendant and to others.

26. KBPC and its predecessors used the asbestos fibers supplied to them by the defendant in the manner for which said asbestos fibers were intended and/or in a manner which was reasonably foreseeable by the defendant.

27. The claimants have alleged injury from exposure to thermal insulation which allegedly contained asbestos fibers supplied to KBPC and its predecessors by the defendant.

28. The allegations comprising the factual background set forth in paragraphs 29 through 75 below were for the most part unknown to Keene and KBPC and its predecessors until after the proceedings alleged herein had been initiated by the claimants.

Factual Background

29. Beginning at least as early as 1934, defendant had been provided with a draft study indicating that exposure to asbestos dust caused a pulmonary fibrosis which was demonstrable on X-ray films.

30. In or about January 1935, the U.S. Public Health Service, an agency of the defendant, published this study on the negative effects of the inhalation of asbestos dust on the lungs of workers in the asbestos textile industry.

31. Nevertheless, in 1934, the U.S. Navy commenced the development of asbestos-insulating materials.

32. By 1937, defendant had adopted the use of insulating materials containing asbestos in its naval vessels.

33. In or about 1938, the U.S. Public Health Service published a study of asbestosis in the asbestos textile industry. The objectives of the study were: to determine the effects of long-continued inhalation of asbestos dust on the human body; to identify the manufacturing processes that create dust; to recommend practices, and, when necessary, equipment that would reduce the dust exposure of workers; and to discover what concentrations of asbestos dust, if any, could be tolerated without injury to health. This study concluded that:

(a) asbestos dust exposure could be held responsible for the cases of pneumoconiosis that had been found in textile factories; and

(b) because clear-cut cases of asbestosis were found only in conjunction with dust concentrations exceeding 5 million particles per cubic foot ("p.p.c.f."), and not at lower concentrations, until better data was available, 5 million p.p.c.f. could be regarded as the threshold limit value ("TLV") for asbestos dust exposure in asbestos factories.

34. The above study urged precautionary measures and elimination of hazardous exposures as follows:

(a) dust control at the point of origin by means of local exhaust hoods so that no dust could reach the breathing zone of workers or contaminate the general air;

(b) clean air should replace the dust laden air removed by the exhaust systems;

(c) workers entering rooms where dust conditions existed should be equipped with approved respirators; and

(d) periodic studies of the condition of the working environment should be conducted to determine whether existing control methods remained adequate.

35. At least as early as 1940, defendant was aware of the hazards of asbestos dust exposures to insulation workers employed in its naval shipyards and was conducting X-ray

examinations of the lungs of such workers for evidence of asbestosis. These X-rays revealed peripheral lung markings which increased over time.

36. At least as early as January 1941, the U.S. Department of Interior, Bureau of Mines, an agency of the defendant, published a list of approved respirators for protection against the inhalation of pneumoconiosis-producing dusts such as asbestos.

37. The Second World War marked the beginning of a concentrated construction program to build combat and other vessels necessary for the war effort. In 1943, defendant's shipyards employed 1,750,000 civilians. It has been estimated that altogether from 3 to 3.5 million civilians worked in defendant's shipyards during the Second World War.

38. In 1942, the American Conference of Governmental Industrial Hygienists, a quasi-official body responsible for making recommendations concerning industrial hygiene, adopted the 5 million p.p.c.f. TLV first proposed by the U.S. Public Health Service in 1938.

39. Some time prior to December 1942, the U.S. Maritime Commission, an agency of the defendant, and the U.S. Navy, concurred that too little attention had been paid to matters involving the health and safety of shipyard employees and decided to conduct a survey for the purpose of developing standards to govern the health of shipyard employees throughout the United States. Dr. Phillip Drinker of the Department of Industrial Hygiene, School of Public Health, Harvard University, and representatives of the U.S. Navy Bureau of Medicine and Surgery toured shipyards throughout the United States for the purpose of presenting to the shipyard industry, including the Navy, minimum standards for the protection of the health of shipyard employees.

40. In or about December 1942, as a result of the tour by Dr. Drinker and his associates, it was determined *inter alia*, that:

(a) asbestosis had occurred in shipyards utilized for the construction or refitting of defendant's naval vessels and was likely to occur again because asbestos was being handled with little or no precautions by insulation workers;

(b) the preventative programs then employed in such shipyards had been ineffective; and

(c) the asbestos health hazard could be controlled by enforcing appropriate ventilation standards in conjunction with mandatory, periodic examinations of shipyard employees.

41. In February 1943, the U.S. Navy and the U.S. Maritime Commission promulgated "Minimum Requirements for Safety and Health in Contract Shipyards." This report specifically identified asbestosis as a hazard of any operation which gave rise to asbestos dust, but asserted that such operations could be performed safely by isolating them, providing ventilation, requiring the operators to wear respirators, and conducting periodic medical examinations.

42. Pursuant to the above report, each shipyard holding contracts with the U.S. Navy and Maritime Commission was given notice that the Maritime Commission would make available safety and industrial health consultants charged with the coordination and supervision of the safety and health programs of the two agencies and that each such shipyard was to cooperate with the assigned consultants and to fully comply with the promulgated minimum standards. These standards required, *inter alia*, the:

(a) appointment of a full time safety director and support staff for each contract shipyard;

(b) appointment of a ventilation supervisor for each shift, responsible to the safety director;

(c) exhaust ventilation adequate to remove hazardous air impurities;

(d) protective respiratory equipment for jobs involving asbestos-containing material; and

(e) assignment of his own, individual respirator to each worker requiring one.

43. During the Second World War and immediately thereafter, despite the issuance of the Minimum Requirements, the problem of asbestos dust inhalation was given low priority, by defendant, and the operational control of occupational health hazards varied from shipyard to shipyard.

44. During the Second World War neither the Navy nor the Maritime Commission enforced their own minimum requirements. This laxity and indifference carried over into the postwar era.

45. In or about 1945, a study was conducted by health consultants from the U.S. Navy and Maritime Commission into the health conditions of workers installing asbestos insulation in both government and contract shipyards.

46. This study indicated that the minimum requirements promulgated in 1943 were being violated in all of the shipyards surveyed. Exhaust ventilation was for the most part non-existent or inadequate and respirators were worn by few if any workers. The asbestos dust concentrations were far in excess of the 5 million p.p.c.f. TLV first suggested by the Public Health Service in 1938.

47. The above study again recommended that adequate exhaust ventilation and respirators were necessary to the maintenance of a low incidence of asbestosis.

48. In 1946 and 1947, the American Conference of Governmental Industrial Hygienists again recommended that the TLV for dust containing asbestos should be below 5 million p.p.c.f.

49. During the early 1950's, considerable ship modernization was undertaken in both Navy and contract shipyards, resulting in extensive worker exposure to dust from ripped-out thermal

insulation containing asbestos. During this period, defendant took few if any precautions on behalf of the insulation workers.

50. The October 1962 issue of the Navy's "Safety Review" published findings that adequate precautions had not been taken at naval shipyards to protect workers against asbestosis and that shipyard insulation employees were engaged in a hazardous trade.

51. In May - June 1964, the head of the Medical Department, Long Beach Naval Shipyard ("LBNS") stated that adequate ventilation for insulation workers was not possible to achieve with the ventilating systems available at LBNS and the workers were therefore exposed to hazardous dust counts which had resulted in asbestosis.

52. In and around 1964, dust counts made at the Norfolk Naval Shipyard ("NNS"), revealed that insulators were exposed to levels of 5-50 million p.p.c.f. and occasionally higher. Recommendations of the Industrial Hygiene Division at NNS for improvement of these conditions were being ignored and had been for some time and it was unknown whether workers were wearing respirators, or wearing them in a proper manner.

53. In June 1965, NNS measured dust counts during the ripout of asbestos insulation from naval ships. Dust counts ranging from 30 to 115 million p.p.c.f. were recorded in the breathing zone.

54. In 1965, an epidemiological study of asbestosis among insulation workers in the United States was undertaken. Evidence of pulmonary asbestosis was found in almost half the workers examined. Among those with more than forty years experience, abnormalities were found in over ninety percent. This study concluded that the installation of asbestos-containing insulation was a hazardous occupation.

55. In 1968, the American Conference of Governmental Industrial Hygienists determined that the TLV for asbestos dust should be reduced to 2 million p.p.c.f.

56. In March 1968, a study by the Industrial Hygiene Division of the San Francisco Bay Naval Shipyard ("SFBNS") indicated that insulators were being exposed to asbestos dust concentrations above the TLV, then extant, during various shipboard operations, including cutting, sawing and rip-out.

57. In December 1968, the Portsmouth Naval Shipyard ("PNS") conducted an investigation of the control of asbestos dust. This investigation revealed a dust problem in the shop area, although PNS officials believed that it could be reduced to an acceptable level. Asbestos dust control aboard ship was very limited in spite of the PNS medical department's expression of strong reservations concerning this condition.

58. In February 1969, the Chief of the Navy's Bureau of Medicine and Surgery sent a letter to the Chief of Naval Operations advising him that reports from naval shipyards indicated continuing problems concerning the control of airborne asbestos and recommended that the industrial hygiene sections of the shipyards conduct surveys for the purpose of evaluating the effectiveness of ventilation control and respiratory protective devices. Later that same year, the Bureau of Medicine and Surgery opined that even one heavy exposure to asbestos dust could be injurious.

59. In or about March 1969, dust counts taken at the Pearl Harbor Naval Shipyard ("PHNS") indicated asbestos dust exposure levels from 12 to 68 million p.p.c.f. during various operations including cutting, sawing and rip-out.

60. Later in 1969, a Navy survey of both government and contract shipyards was published, indicating that in every instance yard management was aware of the hazards attending the use of asbestos insulating materials, but had failed to exercise sufficient care necessary to seek to abate the problem.

61. This report further indicated that the wearing of respirators was not generally enforced and that dust counts were excessive due to inadequate exhaust ventilation and other improper practices.

62. The above report concluded: that considerable asbestos-containing insulation material currently was being used in naval applications; that stringent handling precautions were not being enforced; and that the use of high asbestos-containing thermal insulating materials should be curtailed due to the hazards to the health of insulation workers.

63. Recognition of the occupational health problem posed by asbestos and other physically harmful substances in part led to the passage of the Occupational Safety and Health Act of 1970 ("OSHA").

64. In February 1971, the Commander, Naval Ship Systems Command, ordered elimination of high asbestos content materials for all new construction provided that for present contracts, the change would be issued as a full priced supplemental agreement which would result in no increase in cost and no extension of delivery dates.

65. In September, 1971, the U.S. General Services Administration indicated to the Navy that it had a substantial amount of asbestos-containing material and asked the Navy not to eliminate GSA as a source of such materials.

66. During 1971 and 1972 dust counts at the PHNS and the LBNS continued to reveal asbestos dust levels well in excess of the then current TLV.

67. In 1972, the National Institute for Occupational Safety and Health adopted a new TLV in connection with OSHA. Under this new standard, which was also adopted by the Navy, exposures were limited to 2 asbestos fibers per cubic centimeter of air, based upon a count of fibers greater than 5 micrometers in length. Peak concentrations were not to exceed 10 fibers per cubic centimeter.

68. During 1974, naval shipyards continued to stock, order and use insulating material containing asbestos, although acceptable substitutes were available.

69. In 1975, dust counts at the Puget Sound Naval Shipyard ("PSNS") revealed asbestos dust levels far in excess of the TLV adopted in connection with OSHA.

70. As late as February 1977 - March 1978, the Navy concluded that the asbestos control procedures in its shipyards continued to be inadequate. Subsequently, in 1979, a study published by defendant's Comptroller General concluded that the Navy continued to take inadequate precautions to protect employees in its shipyards from asbestos exposures in excess of the OSHA standard.

71. Throughout the period 1947 and thereafter, the LBNS, the PSNS, the NNS, the Boston Naval Shipyard and other government shipyards, as well as contract shipyards, reported numerous cases of asbestosis and other harmful conditions.

72. During the times relevant herein, defendant believed that the inhalation of asbestos laden dust might cause asbestosis and other harmful conditions. Defendant further believed that the danger could be controlled by maintaining a modest level of exposure.

73. Defendant failed to disclose to KBPC and its predecessors its superior knowledge of the allegedly harmful character of asbestos fibers and the improper manner in which asbestos-containing thermal insulation was being utilized and installed in facilities subject to its control and regulation in violation of its own safety standards.

74. Defendant's programs to prevent asbestosis and other harmful conditions among insulation workers in facilities subject to its control and regulation have been haphazard, inadequate and/or unenforced.

75. During the times relevant herein defendant had the duty to protect workers, including claimants, employed in facilities subject to its control and regulation, from asbestosis and other harmful conditions, but failed to exercise a sufficient degree of care to do so.

Allegations Against the Defendant

76. In 1971 and, on information and belief, on other prior occasions, KBPC and its predecessors purchased asbestos fiber from defendant pursuant to express contracts. For example, on or about May 19, 1971, pursuant to Order Number T-1480 and on or about September 27, 1971, pursuant to Contract Number GS-00-DS-(S)-23062 the United States of America through its General Services Administration sold to KBPC 430 short tons of amosite asbestos fibers at a total price of \$79,550.

77. As a supplier of asbestos fiber incorporated unchanged into thermal insulation products manufactured by KBPC and its predecessors, defendant implicitly warranted that such asbestos fiber was safe to use for this purpose.

78. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials, vastly exceeded that of KBPC and its predecessors.

79. KBPC and its predecessors properly relied on defendant's aforesaid skill and judgment and upon defendant's warranty.

80. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that the asbestos fiber supplied by defendant to KBPC and its predecessors was not safe for its intended and foreseeable use.

81. By reason of the foregoing, defendant is liable to Keene for any amounts which have been, or which may be recovered from Keene by the claimants, by settlement or judgment, and defendant is additionally liable to Keene by reason of said breach for the costs incurred by Keene as a result of the proceedings initiated by the claimants, including attorneys' fees, increased insurance costs and the cost of executive time expended on such claims.

COUNT II

82. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

83. KBPC and its predecessors sold to defendant thermal insulation containing asbestos, pursuant to express contracts.

84. Defendant had the duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

85. Defendant had the further duty to provide claimants employed in facilities subject to its control or regulation with a safe place to work.

86. As the party which required its independent contractors to use asbestos-containing thermal insulation at various facilities, with knowledge of its alleged danger, the defendant also had the duty to see that its independent contractors took the necessary precautions to protect the health of their asbestos insulation workers, including claimants, from any hazards attendant on the use of asbestos.

87. The above duties imposed upon defendant the obligation to warn all claimants employed at facilities subject to its control or regulation of any danger in the use of asbestos insulation and to provide adequate precautions for their health and safety, including the promulgation and enforcement of prophylactic health safety standards.

88. As the party responsible for regulating the work practices of all such claimants and for providing them with a safe place to work, or assuring that they were so provided, defendant warranted to KBPC and its predecessors that adequate precautions would be taken so that thermal insulation containing asbestos sold to defendant by KBPC and its predecessors for use at facilities subject to defendant's regulation and control would be installed and otherwise handled in a safe manner.

89. KBPC and its predecessors relied upon this warranty.

90. If Keene is deemed to be liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that defendant

failed to take adequate precautions to assure that asbestos-containing thermal insulation used in facilities subject to its control and regulation, was installed or otherwise handled in a safe manner.

91. On the basis of its superior knowledge defendant knew, or should have known, that its breach of the foregoing warranty would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

92. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT III

93. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

94. KBPC and its predecessors sold to defendant thermal insulation containing asbestos, pursuant to express contracts.

95. Defendant had the duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

96. Defendant at various times relevant herein has inspected its naval and contract shipyards and other facilities subject to its control and regulation at which claimants were employed, to determine whether any safety hazards existed at said facilities and/or in any of the products containing asbestos fibers located or installed therein.

97. By conducting such inspections, and having the authority to regulate the working conditions at such facilities, defendant warranted to KBPC and its predecessors that adequate precautions would be taken so that thermal insulation containing asbestos sold to defendant by KBPC and its predecessors for use at such facilities would be installed or otherwise handled in a safe manner.

98. KBPC and its predecessors relied on this warranty.

99. If Keene is deemed to be liable to any claimants for injuries alleged in their numerous complaints, then defendant's warranty was false and was breached by reason of the fact that defendant failed to take adequate precautions to assure that asbestos-containing thermal insulation used at the foregoing facilities, was installed or otherwise handled in a safe manner.

100. On the basis of its superior knowledge defendant knew, or should have known, that its breach of the foregoing warranty would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

101. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT IV

102. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

103. KBPC and its predecessors sold to defendant thermal insulation containing asbestos, pursuant to express contracts.

104. Defendant had the duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

105. As the designer and issuer of the specifications requiring the use of asbestos in thermal insulation manufactured by KBPC and its predecessors and intended for use on defendant's naval vessels and in facilities subject to its control and regulation, defendant implicitly warranted that if its specifications were complied with, satisfactory performance would result, or, in other words, that thermal insulation containing asbestos, manufactured to defendant's specifications, was safe for its intended use.

106. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials, vastly exceeded that of KBPC and its predecessors.

107. KBPC and its predecessors properly relied on defendant's aforesaid skill and judgment and upon defendant's warranty.

108. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's specifications were faulty and defendant's warranty was false and was breached by reason of the fact that the asbestos-containing thermal insulation manufactured pursuant to defendant's specifications was not safe for its intended and foreseeable use.

109. On the basis of its superior knowledge defendant knew, or should have known, that its breach of the foregoing warranty would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

110. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

WHEREFORE, Keene demands judgment against defendant for indemnity or contribution, or both, and/or apportionment, for any amounts which have been or which may be recovered from Keene by the claimants and for the costs incurred by Keene as a result of the proceedings initiated by the claimants including attorneys' fees, increased insurance costs and the cost of executive time expended on such claims, plus the costs and disbursements of this action and any further relief that is just and appropriate.

Dated: New York, New York
December 20, 1979

Jerold Oshinsky
1800 K Street, N.W.
Washington, D.C. 20006
(202) 466-7814

-and-

Nicholas L. Coch
630 Fifth Avenue
New York, N.Y. 10020
(212) 397-9700

Attorneys for Plaintiff:

Of Counsel:

Anderson Russell Kill Olick & Baker
1800 K Street, N.W.
Washington, D.C. 20006

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

| | | |
|--------------------------------------|---|-------------------------|
| ELSIE MILLER, Personal Represen- | : | |
| tative of the Estate of ADA M. DZON, | : | |
| Deceased, | : | |
| | : | |
| | : | Plaintiff, |
| | : | |
| vs. | : | Civil Action |
| | : | No. 78-1283E |
| | : | |
| JOHNS-MANVILLE PRODUCTS COR- | : | |
| PORATION, a corporation, JOHNS- | : | |
| MANVILLE SALES CORPORATION, a | : | |
| corporation, UNARCO INDUSTRIES, | : | |
| INC., a corporation, GAF CORPORA- | : | |
| TION, a corporation, RAYBESTOS- | : | |
| MANHATTAN, INC., a corporation, | : | |
| KEENE BUILDING PRODUCTS COR- | : | |
| PORATION, a corporation, EAGLE | : | |
| PICHER INDUSTRIES, INC., a cor- | : | |
| poration, and FORTY EIGHT INSULA- | : | |
| TIONS, INC., a corporation, | : | |
| | : | |
| | : | Defendants and |
| | : | Third-Party Plaintiff, |
| | : | |
| | : | vs. |
| | : | |
| UNITED STATES GOVERNMENT and | : | |
| CELOTEX CORPORATION, | : | |
| | : | |
| | : | Third-Party Defendants. |

AMENDED THIRD-PARTY COMPLAINT

AND NOW comes the Defendant and Third-Party Plaintiff, Keene Corporation, erroneously styled as Keene Building Products Corporation, and makes this Third-Party Complaint against United States Government and Celotex Corporation as follows:

1. The plaintiff has filed a Complaint against Keene Building Products Corporation and the other named defendants alleging that the plaintiff's decedent, while employed by Dravo Corporation from 1943 until 1944, as a laborer, was exposed to and did inhale asbestos dust and fibers, which caused the condition as alleged in plaintiff's Complaint and as more fully set forth in plaintiff's Complaint. A true and correct copy of the plaintiff's Complaint is attached hereto and made a part hereof and marked as Exhibit "A".

2. This Defendant and Third-Party Plaintiff has filed an Answer denying any and all liability. A true and correct copy of said Answer is attached hereto, made a part hereof and incorporated by reference, marked as Exhibit "B".

3. The Court has jurisdiction over this action pursuant to Title 28 U.S.C.A. Section 1346 (b), since the plaintiff's decedent's alleged claim is for money damages occurring on and after January 1, 1945 for personal injury and death.

4. The United States Government has waived immunity to suit pursuant to Title 28 U.S.C.A. Section 2674.

5. Third-Party Defendant, Celotex Corporation, is a Delaware Corporation and a subsidiary of Walter Jim Corporation with an office for conducting business located at 1500 North Dale Mabery Highway, Tampa, Florida, and is qualified to do business in the Commonwealth of Pennsylvania and, further, is the successor to Phillip Carey Manufacturing Company.

6. This defendant avers that at the times relevant to plaintiff's Complaint, plaintiff's decedent, during the course of her employment as a laborer at Dravo Corporation, if she was exposed to and did inhale asbestos fibers and dust, said dust and fibers were those of products mined, milled, manufactured, fabricated, supplied and/or sold by the Third-Party Defendant, Celotex Corporation, or its predecessor, the Phillip Carey Manufacturing Company.

7. This defendant avers that if the plaintiff's decedent was exposed to dust or fibers of asbestos products, those products

were supplied by the United States Government or were supplied to the United States Government pursuant to specifications instituted by the United States Government and required by the United States Government Contracts.

8. At all times material hereto, the United States Government was acting through its employees who were acting within the scope of their office or employment.

9. This defendant has denied any and all liability. However, in the alternative, if this defendant is found liable, a liability it expressly denies, then it is averred that the Third-Party Defendants are jointly and severally liable with this defendant to plaintiff for the reasons averred in the plaintiff's Complaint, the contents of which are herein incorporated by reference as though the same were set forth herein at length and verbatim. This defendant avers that the Third-Party Defendants are liable over to it for contribution and/or indemnity and for the purpose of asserting a Crossclaim against said Third-Party Defendants only does incorporate the allegations of plaintiff's Complaint, specifically, that Third-Party Defendants are liable to plaintiff for their negligence, breach of warranty and as a result of the strict duty and liability imposed under Sec. 402A of the Restatement of Torts 2d.

WHEREFORE, Keene Building Products Corporation, Defendant and Third-Party Plaintiff, demands judgment against the Third-Party Defendants for part of or for all sums by way of either contribution or indemnity that may be adjudged against this party and in favor of the plaintiff.

KYLE AND EHRMAN

BY

Attorney for Defendant,
Keene Building Products Corp.

APPENDIX J

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ELSIE MILLER, Personal Representa-)
tive of the Estate of ADA M. DZON,)
Deceased,)
Plaintiff)

vs.

JOHNS-MANVILLE PRODUCTS COR-)
PORATION, a corporation, JOHNS-)
MANVILLE SALES CORPORATION, a) Civil Action
corporation, UNARCO INDUSTRIES, No. 78-1283E
INC., a corporation, GAF CORPORA-)
TION, a corporation, RAYBESTOS-)
MANHATTAN, INC., a corporation,)
THE CELOTEX CORPORATION, a)
corporation, KEENE BUILDING)
PRODUCTS CORPORATION, a cor-)
poration, EAGLE PICHER IN-)
DUSTRIES, INC., a corporation, and)
FORTY EIGHT INSULATIONS, INC.,)
a corporation,)
Defendants)

A JURY TRIAL IS DEMANDED

C O M P L A I N T

FIRST: The plaintiff is an individual and Personal Representative of the Estate of Ada M. Dzon, and is a citizen of the State of Florida, and decedent, Ada M. Dzon, was a citizen of the State of Florida.

SECOND: The defendant, Johns-Manville Products Corporation, is a corporation incorporated under the laws of the State of Delaware and having its principal place of business in Denver, Colorado and is qualified to do business in the Commonwealth of Pennsylvania with offices for the conducting of business located at Monroe Complex, Building #3, Suite #2, Mosside Boulevard, Monroeville, Pennsylvania 15146.

THIRD: The defendant, Johns-Manville Sales Corporation, is a corporation incorporated under the laws of the State of Delaware and having its principal place of business in Denver, Colorado and is qualified to do business in the Commonwealth of Pennsylvania with offices for the conducting of business located at Monroe Complex, Building #3, Suite #2, Mosside Boulevard, Monroeville, Pennsylvania 15146.

FOURTH: The defendant, Unarco Industries, Inc., is a corporation incorporated under the laws of the State of Illinois and having its principal place of business in Chicago, Illinois and is qualified to do business in the Commonwealth of Pennsylvania.

FIFTH: The defendant GAF Corporation is a corporation incorporated under the laws of the State of Delaware and having its principal place of business in New York, New York and is qualified to do business in the Commonwealth of Pennsylvania.

SIXTH: The defendant Raybestos-Manhattan, Inc., is a corporation incorporated under the laws of the State of New Jersey and having its principal place of business in the Trumbull, Connecticut and is qualified to do business in the Commonwealth of Pennsylvania.

SEVENTH: The defendant The Celotex Corporation is a corporation incorporated under the laws of the State of Delaware and having its principal place of business in Tampa, Florida and is qualified to do business in the Commonwealth of Pennsylvania.

EIGHTH: The defendant Keene Building Products Corporation is a corporation incorporated under the laws of the State of Delaware and having its principal place of business in Sante Fe Springs, California and is qualified to do business in the Commonwealth of Pennsylvania.

NINTH: The defendant, Eagle Picher Industries, Inc., is a corporation incorporated under the laws of the State of Ohio and having its principal place of business located in the State of Ohio and is qualified to do business in the Commonwealth of Pennsylvania.

TENTH: The defendant, Forty-Eight Insulations, Inc., is a corporation incorporated under the laws of the State of Illinois and having its principal place of business located in Aurora, Illinois and is qualified to do business in the Commonwealth of Pennsylvania.

ELEVENTH: Jurisdiction is conferred by reason of the diversity of citizenship of the parties and the amount in controversy exceeds Ten Thousand (\$10,000.00) Dollars, exclusive of costs and interest.

TWELFTH: At all times pertinent hereto, the defendants acted through their duly authorized agents, servants and employees, who were then and there in the course and scope of their employment and in furtherance of the business of said defendants.

THIRTEENTH: Plaintiff's decedent died on November 10, 1977 from malignant mesothelioma.

FOURTEENTH: At all times relevant hereto, the plaintiff's decedent worked for Dravo Corporation, Neville Island, Pittsburgh, Pennsylvania, from 1943 until 1944 as a laborer.

FIFTEENTH: During the period of time set forth hereinabove, plaintiff's decedent, while employed by said Dravo Corporation as a laborer, was exposed to and did inhale asbestos dust and fibers which caused the condition as hereinafter set forth resulting in plaintiff's decedent's disability and death.

SIXTEENTH: Defendants, at all times relevant and pertinent hereto, were engaged in the business of mining, milling, manufacturing, fabricating, supplying and selling asbestos containing products to which plaintiff's decedent was exposed.

SEVENTEENTH: Solely and directly as a result of the inhalation of the asbestos fibers and dusts contained in the products of defendants, plaintiff's decedent contracted malignant mesothelioma with associated complications which resulted in her disability and death.

EIGHTEENTH: Plaintiff's decedent's disease of malignant mesothelioma with associated complications were solely and directly caused by the acts of the defendants acting through their agents, servants and employees and the defendants are liable therefore, jointly and severally, to the plaintiff for their negligence, breach of warranty and as a result of the strict duty and liability imposed under § 402A of the *Restatement of Torts (Second)*.

NINETEENTH: The defendants mined, milled, manufactured, fabricated, supplied and sold asbestos containing products which they knew were unreasonably dangerous to the user or consumer, such as plaintiff's decedent, and acted in such a manner which was willful, wanton, gross and in total disregard for the health and safety of the user or consumer, i.e. plaintiff's decedent.

TWENTIETH: Defendants, individually, together and/or as a group, have possessed, since 1929, medical and scientific data which indicated that asbestos containing insulation materials were hazardous to health. Prompted by pecuniary motives, the defendants, individually, together and/or as a group, willfully and wantonly ignored and/or failed to act upon said medical and scientific data. Rather, they conspired together to deceive the public in several respects: by controlling industry-supported research in a manner inconsistent with the health and safety interests of asbestos users and consumers; by successfully tainting reports of medical and scientific data appearing in industry and medical literature; by suppressing the dissemination of certain medical and scientific information relating to the harmful effects of exposure to asbestos containing products; and by prohibiting the publication of certain scientific and medical articles. Such conspiratorial activities deprived the users, mechanics, laborers and installers of defendants' asbestos products, of the opportunity to determine whether or not they would expose themselves to the unreasonably dangerous asbestos products of said defendants.

TWENTY FIRST: As a result of the disability and death of plaintiff's decedent resulting from malignant mesothelioma with

associated complications, the plaintiff seeks compensatory damages for personal injuries and under the applicable Survival and Wrongful Death Statutes.

TWENTY SECOND: The plaintiff further seeks exemplary and punitive damages against the defendants to punish the defendants for their actions which were willful, wanton, gross and in total disregard of the health and safety of the users and consumers of their products, as well as those elements of a civil conspiracy set forth in Paragraph (20) above, i.e. plaintiff's decedent, in an amount in excess of Ten Thousand (\$10,000.00) Dollars.

Hence this suit.

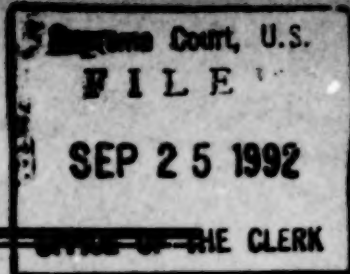
NORMAN A. GREEN

BASKIN, BOREMAN, WILNER,
SACHS, CONDELMAN

s/s Norman A. Green
Attorney for Plaintiff

By s/s Thomas W. Henderson
Thomas W. Henderson
Attorney for Plaintiff

(3)
No. 92-166



In the Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

BARBARA C. BIDDLE
ROBERT M. LOEB
Attorneys

*Department of Justice
Washington, D.C. 20530
(202) 514-2217*

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QUESTION PRESENTED

Under 28 U.S.C. 1500, the Claims Court lacks subject matter jurisdiction over "any claim for or in respect to which the plaintiff * * * has pending in any other court any suit or process against the United States" or its agents. The questions presented are:

1. Whether the Claims Court lacks jurisdiction under Section 1500 if at any time during the Claims Court proceedings the plaintiff has pending in another court a suit or process against the United States involving the same claim.

2. Whether petitioner's actions against the United States involved the same claim for purposes of Section 1500.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-166

KEENE CORPORATION, PETITIONER

v.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A34) is reported at 962 F.2d 1013. The opinion of the Claims Court (Pet. App. E1-E27) is reported at 17 Cl. Ct. 146.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1992. The petition for a writ of certiorari was filed on July 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. In June 1979, petitioner filed a third-party complaint against the United States in *Miller v.*

Johns-Manville, No. 78-1283E (W.D. Pa.). Petitioner sought reimbursement for any tort liability it might incur for injuries caused by the plaintiff's exposure to asbestos while working for a private company that performed work for the United States Navy pursuant to a government contract. Pet. App. 11-13. Petitioner voluntarily dismissed the third-party complaint in May 1980. Pet. App. E15.

b. In January 1980, petitioner commenced an omnibus tort action in the Southern District of New York against the United States seeking to recover money that it has paid or expects to pay to some 14,000 tort claimants who were exposed to asbestos while working at naval shipyards or for private companies acting under contract for the United States Navy. On September 30, 1981, the district court dismissed the action, primarily on the ground that petitioner's claims against the United States failed to meet the requirements of the Federal Tort Claims Act, 28 U.S.C. 2675(a). The court of appeals affirmed. *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.), cert. denied, 464 U.S. 864 (1983).

c. In 1982, after the district court in the Southern District of New York had rejected petitioner's tort claims, petitioner brought a second omnibus tort action against the United States in the District of Columbia. In July 1984, the district court held that principles of collateral estoppel required dismissal of petitioner's claims. *Keene Corp. v. United States*, 591 F. Supp. 1340, 1345-1349 (D.D.C. 1984). The court of appeals affirmed. *GAF Corp. v. United States*, 818 F.2d 901, 912-916 (D.C. Cir. 1987).

2. a. In December 1979—while petitioner's third-party complaint in *Miller* was pending—petitioner filed an action under the Tucker Act, 28 U.S.C. 1491, in the Court of Claims. *Keene Corp. v. United States*,

No. 579-79C. Petitioner sought indemnity from the United States for any amounts paid by petitioner to tort claimants exposed to asbestos while working at naval shipyards or for companies under contract to the United States Navy. Pet. App. H1-H20.

b. On September 25, 1981—after petitioner's third-party complaint in *Miller* was dismissed but while its omnibus tort action was pending in New York—petitioner filed a second action in the Court of Claims under the Tucker Act. *Keene Corp. v. United States*, No. 585-81C. In this action, petitioner contended that the government's recoupment of money paid under the Federal Employees' Compensation Act to federal workers injured by exposure to asbestos was a taking of property without just compensation, in violation of the Fifth Amendment. Pet. App. F1-F12.

3. In February 1987, the United States filed a motion in the Claims Court¹ to dismiss petitioner's complaints, and similar complaints brought by other asbestos manufacturers, for lack of subject matter jurisdiction pursuant to 28 U.S.C. 1500.² The government contended that the Claims Court lacked jurisdiction over the claims because petitioner had

¹ Effective October 1, 1982, the Claims Court was established in place of the former Court of Claims at the trial level. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25.

² Section 1500 of Title 28 provides:

The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when * * * [the] case arose, was, in respect thereto, acting or professing to act directly or indirectly under the authority of the United States.

other actions involving the same dispute pending in other courts.

In April 1987, the Claims Court granted the government's motion as to one claimant, Johns-Manville. *Keene Corp. v. United States*, 12 Cl. Ct. 197 (1987). The court did not rule on the motion with respect to petitioner or the other manufacturers, but noted that their claims likely would be dismissed under Section 1500 for lack of jurisdiction. *Id.* at 198-199 n.1. The court of appeals affirmed. *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988), cert. denied, 489 U.S. 1066 (1989).

4. a. In November 1988, the government filed a second motion to dismiss petitioner's claims under 28 U.S.C. 1500. The Claims Court granted the government's motion as to all plaintiffs except GAF Corporation.³ The court held that Section 1500 required dismissal of the other asbestos manufacturers' claims, because at the time the actions were filed in the Claims Court, the plaintiffs had other actions involving the same dispute pending against the United States. The Claims Court rejected petitioner's argument that the subsequent termination of the district court actions vested it with jurisdiction over the complaints. Pet. App. E1-E27.

b. The court of appeals reversed. Pet. App. D1-D30. The court held that "when an earlier-filed district

³ The Claims Court, relying on *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Cl. Ct. 1965), cert. denied, 382 U.S. 976 (1966), held that Section 1500 did not apply to GAF because GAF filed its district court action one day after it filed suit in the Claims Court. Pet. App. E25-E26. The Claims Court subsequently rejected GAF's claims on the merits, and the court of appeals affirmed. *GAF Corp. v. United States*, 19 Cl. Ct. 490 (1990), aff'd, 932 F.2d 947 (Fed. Cir. 1991), cert. denied, 112 S. Ct. 965 (1993).

court case is finally dismissed before the Claims Court entertains and acts on a § 1500 motion to dismiss, § 1500 does not bar Claims Court jurisdiction even though the dismissal may have occurred after the filing of the Claims Court action." Pet. App. D22.

Judge Mayer dissented. Pet. App. D26-D30. He concluded that the panel's holding "is contrary to the unambiguous language of the statute, its purpose and history." Pet. App. D26. Judge Mayer reasoned that the Claims Court's jurisdiction "should not depend on when a motion to dismiss under section 1500 is filed or is considered by the court, but on whether the same claim is before another court when the Claims Court suit is filed." *Ibid.* Otherwise, "jurisdiction turns on things like the state of the trial court's docket and the diligence of the assigned judge, factors completely unrelated to the purpose of section 1500 or any other jurisdictional statute, and which are bound to lead to erratic and unpredictable rulings." *Ibid.*

c. The court of appeals granted rehearing *en banc* and reinstated the decision of the Claims Court. Pet. App. A1-A24. The court of appeals reexamined its prior decisions and concluded that Section 1500 had become "rife with judicially created exceptions and rationalizations to the point that it no longer serves its purposes: to force an election of forum and to prevent simultaneous litigation against the government." Pet. App. A14. The court observed that "[i]t is a rare plaintiff who could not find an exception to his liking if he tried hard enough." *Ibid.*

The court of appeals concluded that the plain meaning of the statute, as well as its purpose, mandates a bright-line rule that the Claims Court lacks jurisdiction over a claim whenever the same claim is pending in another court. Accordingly, the court held:

1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on; 2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction, regardless of when the Court memorializes the fact by order of dismissal; and 3) if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata and available defenses apply.

Pet. App. A15.

The court of appeals declined to construe Section 1500 to permit "a plaintiff to maintain cases in both courts until the government moves to dismiss the Claims Court suit or until a judge addresses the motion." Pet. App. A16. The court explained that such a rule would defeat the "recognized purpose of section 1500" by "compell[ing] the government to defend two suits simultaneously." Pet. App. A16.

For similar reasons, the court also declined to read Section 1500 as turning on the order of the plaintiff's filings. Accordingly, the court overruled *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966), which held that Section 1500 barred a plaintiff from commencing an action in the Claims Court if the claim was already pending in another court, but did not divest the Claims Court of jurisdiction if the plaintiff commenced an action on the same claim in another court after it filed an action in the Claims Court. Pet. App. A18-A19. The court also overruled several other cases that allowed plaintiffs to litigate the same claim in two courts at the same time, or created exceptions

contrary to the plain language of the statute. See Pet. App. A16-A17 & n.3.

The court then reaffirmed its holding in *Johns-Manville* that two actions involve the same "claim" for purposes of Section 1500 if they are based on the same operative facts. The court rejected the contention that a "claim" refers to a particular legal theory, explaining that such a narrow construction of "claim" would render Section 1500 ineffective against the very abuse it was intended to prevent. Pet. App. A19-A20.

Finally, the court of appeals rejected the argument that its decision should only apply prospectively. Because a court "lacks discretion to consider the merits of a case over which it is without jurisdiction, * * * a jurisdictional ruling may never be made prospectively only." Pet. App. A22-A23, quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

Chief Judge Nies wrote a separate opinion suggesting that, where a party is barred by Section 1500 from litigating simultaneous actions against the United States in the Claims Court and another court, equitable tolling of the statute of limitations may be available in appropriate circumstances. See *Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990). Pet. App. A24-A25.

Judge Plager dissented. Pet. App. A25-A34. In Judge Plager's view, the language of Section 1500 is not plain, and the legislative history indicates that Congress intended only to save the government the expense of relitigating cases in the Claims Court that it has already won in other courts. Judge Plager further concluded that Section 1500 is not a typical jurisdictional statute because it cuts off jurisdiction rather than creating it. Judge Plager would have

reaffirmed the rule that “when an earlier-filed district court [action] is finally dismissed before the Claims Court entertains and acts on a § 1500 motion to dismiss, § 1500 does not bar Claims Court jurisdiction.” Pet. App. A31.

ARGUMENT

Petitioner contends (Pet. 8-9) that the decision of the court of appeals is a “radical exercise in judicial legislation.” On the contrary, the decision of the court of appeals—which was joined by nine of the ten judges on that court—is faithful to the plain language and purpose of 28 U.S.C. 1500. Accordingly, further review is not warranted.

1. Section 1500 divests the Claims Court of subject matter jurisdiction over any claim “for or in respect to which” the plaintiff “has pending in any other court any suit or process against the United States.” As this Court recognized in construing the predecessor of Section 1500, “the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we are not at liberty to add an exception in order to remove apparent hardship.” *Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924).

a. Petitioner contends (Pet. 10-12) that the court of appeals erred by overruling *Tecon Engineers, Inc., v. United States*, *supra*. *Tecon* held that Section 1500 bars Claims Court jurisdiction only if the plaintiff sues first in district court and then in the Claims Court, but not if the plaintiff sues first in the Claims Court and then in the district court. 343 F.2d at 946, 949.

As an initial matter, the court of appeals would have reached the same result in petitioner’s case even if it had applied the *Tecon* rule. Petitioner had a claim

pending against the United States in *Miller* when it filed its first action in the Claims Court. And petitioner had an omnibus tort action pending against the United States in *Keene* when it filed its second action in the Claims Court. Consequently, the Claims Court lacked jurisdiction over petitioner’s claims even under *Tecon*.

In any event, the court of appeals correctly held that the *Tecon* rule is contrary to the plain language of Section 1500, as well as the purpose of the statute and this Court’s decision in *Corona Coal*. Pet. App. A10-A13, A18-A19.

Section 1500 plainly provides that the Claims Court lacks jurisdiction if the plaintiff “has pending” any action involving the same claim in another court. Contrary to that clear statutory command, *Tecon* allowed a plaintiff to litigate a claim simultaneously in the Claims Court and another court as long as the plaintiff filed first in the Claims Court.

The *Tecon* rule is also inconsistent with the purpose of Section 1500, which is to “prevent the prosecution at the same time of two suits against the Government.” *Matson Navigation Co. v. United States*, 284 U.S. 352, 355 (1932). See *Johns-Manville Corp. v. United States*, 855 F.2d at 1562. To achieve that purpose, Congress required plaintiffs to make an election whether to sue the government in the Claims Court or in some other forum. *Matson Navigation*, 284 U.S. at 356 (the stated purpose of the statute is to require “an election between a suit in the Court of Claims and one brought in another court”); see Cong. Globe, 40th Cong., 2d Sess. 2769 (1868). *Tecon* created a simple device that allowed plaintiffs to subvert the congressional purpose. As a leading authority stated, “Section 1500 does not belong on the books if, as the result in *Tecon* would indicate, it may readily be

evaded by the informed, and remains a trap only for [the] unfamiliar." See Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and its Agents*, 55 Geo. L.J. 573, 597 (1967).

In addition, the *Tecon* rule is inconsistent with this Court's decision in *Corona Coal*. The Court of Claims action in *Corona Coal* was filed well before the district court action—indeed, the initial decision was issued before the district court action was filed. 263 U.S. at 539. This Court nevertheless held that the predecessor of Section 1500 required dismissal of the Court of Claims action. 263 U.S. 539-540.⁴

b. For similar reasons, the court of appeals correctly held that Section 1500 does not authorize the Claims Court to exercise jurisdiction so long as all other pending actions concerning the same claim are terminated before the Claims Court rules on the government's motion to dismiss. See *Johns-Manville Corp. v. United States*, 855 F.2d at 1565. Section 1500 bars the Claims Court from exercising jurisdiction whenever a plaintiff seeks to litigate duplicative claims in the Claims Court and in another court at the same time. See *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 95 (1924); *Hill v. United States*, 8 Cl. Ct.

⁴ Petitioner also contends (Pet. 13-14) that the court of appeals erred by refusing to overrule *Tecon* only prospectively. That contention is meritless. A federal court has no discretion to expand its subject matter jurisdiction. Consequently, a decision that the court lacks jurisdiction "may never be made prospectively only." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). In any event, as we have explained, the result in this particular case would have been the same even under *Tecon*. The court of appeals' decision therefore is no different, in practical effect, from a prospective overruling of that case.

382, 385-386 (1985) ("words 'shall not' are an absolute bar depriving this court of any discretion, whatsoever, when duplicative claims are filed"). The jurisdictional bar of Section 1500 remains in force until suit or process in the other court is terminated. Once the other suit is terminated, the plaintiff may then sue in the Claims Court, as long as the action is not barred by the statute of limitations. But the termination of the other action does not mean that the Claims Court had jurisdiction while the other suit was pending. See *British Am. Tobacco Co. v. United States*, 89 Ct. Cl. 438, 441 (1939), cert. denied, 310 U.S. 627 (1940).

Nor does the jurisdictional bar of Section 1500 spring into existence only if and when the government files a motion to dismiss for lack of jurisdiction. Section 1500, like other limitations on the subject matter jurisdiction of federal courts, cannot be waived by the parties. *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 383 (1884). Thus, the court of appeals correctly rejected petitioner's arguments for "a free floating jurisdictional bar that attaches only when the government files a motion to dismiss or, worse, when the court gets around to acting on it." Pet. App. A16. As the court of appeals recognized, such a rule would create "arbitrary and whimsical jurisdictional result[s]." Pet. App. A15.

2. Petitioner contends (Pet. 14-16) that Section 1500 does not require dismissal of its claims because those claims "differ[] markedly" from the claim it raised in *Miller v. Johns-Manville*, No. 78-1283E (W.D. Pa. 1979). The Claims Court held that petitioner's third-party complaint in *Johns-Manville* was a

"suit[] on the same claims as [petitioner's] claims filed in the Court of Claims." Pet. App. E21. The Claims Court concluded that the claims were "framed upon a homogeneity of operative facts," Pet. App. E20, and the court of appeals said it had "no quarrel with the Claims Court determination that the underlying facts in *Miller* and [the Claims Court actions] are the same." Pet. App. A22. That fact-bound determination merits no further review.

Moreover, while petitioner was litigating its claims in the Claims Court it also litigated two major omnibus tort actions against the United States. Those two actions involved the same claim that was pending before the Claims Court—whether the United States was liable to petitioner for payments to workers injured due to asbestos exposure while working at naval shipyards or to fulfill government contracts. Consequently, even if petitioner had not filed a third-party complaint against the United States in *Miller*, its simultaneous litigation of the same dispute in two other federal district court actions between 1979 and 1987 divested the Claims Court of jurisdiction over petitioner's claims under 28 U.S.C. 1500.

3. Finally, petitioner contends (Pet. 16-20) that the consequences of dismissing its actions under Section 1500 are unduly harsh. The short answer to that contention is that "the words of the statute are plain," and therefore the courts "are not at liberty to add an exception in order to remove apparent hardship." *Corona Coal Co. v. United States*, 263 U.S. at 540. That principle applies with added force where, as here, plain statutory language limits the subject matter jurisdiction of federal courts.

Petitioner asserts (Pet. 17) that courts "must hold the Government-as-defendant to the same standards it

would apply in a contribution claim against General Motors." Petitioner overlooks the principle that "the United States, as sovereign, 'is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court's jurisdiction.'" *United States v. Testan*, 424 U.S. 392, 399 (1976), quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941). Section 1500 places a condition on the government's waiver of sovereign immunity that the courts must enforce.

Although petitioner complains that it has been deprived of any opportunity to litigate its claims against the United States, it was petitioner who chose to file multiple lawsuits against the United States raising essentially the same claim in the Western District of Pennsylvania, the Southern District of New York, the District of Columbia, and the Claims Court.⁵ As the court of appeals explained, there is "no harm in requiring a party to carefully assess his claims before filing and choose the forum best suited to the merits of the claims and the applicable statutes of limitations." Pet. App. A14. Nor is petitioner correct in asserting (Pet. 17) that Section 1500 serves no useful purpose. "[A] prohibition against suing the government simultaneously in multiple forums, and the likely inability to sue the government twice successively, are even more salutary in this day of excessive litigation than they were back in the Civil War era whence section 1500 comes." Pet. App. A14-A15.

⁵ In view of the fact that petitioner has engaged in years of litigation against the United States in these various courts, petitioner's assertion (Pet. 15) that it was "not attempting to force the Government to defend itself in two places at once" is surprising.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR

Solicitor General

STUART M. GERSON

Assistant Attorney General

BARBARA C. BIDDLE

ROBERT M. LOEB

Attorneys

SEPTEMBER 1992

(4)
No. 92-166

Supreme Court, U.S.
FILED

OCT 8 1992

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**PETITIONER'S REPLY TO THE BRIEF FOR
THE UNITED STATES IN OPPOSITION TO
ITS PETITION**

JOHN H. KAZANJIAN
Counsel of Record
IRENE C. WARSHAUER
MARY BETH GORRIE
Counsel for Petitioner
Keene Corporation
ANDERSON KILL OLICK &
OSHINSKY, P.C.
666 Third Avenue
New York, New York 10017
(212) 850-0700

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**PETITIONER'S REPLY TO THE BRIEF FOR
THE UNITED STATES IN OPPOSITION TO
ITS PETITION**

Petitioner Keene Corporation ("Keene")¹ submits this Reply Brief in further support of its Petition for a Writ of Certiorari. Keene seeks review of a decision by the United States Court of Appeals for the Federal Circuit, *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992) ("UNR") (Pet. App. at A-1)², which dismissed Keene's actions against the Government in the United States Claims Court for indemnity and contribution in connection with thousands of asbestos personal injury cases.

¹ Pursuant to Rule 29.1 of the Rules of this Court, Keene states that it has no parent companies or nonwholly-owned subsidiaries that are required to be named herein. Pursuant to Rule 14.1(b), UNR Industries, Inc., UNARCO Industries, Inc. and Eagle-Picher Industries, Inc. were parties in the proceeding before the Federal Circuit along with Petitioner Keene and the Respondent United States. GAF Corporation was *amicus curiae* in that proceeding.

² "Pet. App. at ____" refers to the Appendix submitted by Keene with its Petition for Writ of Certiorari.

ARGUMENT

I.

THE GOVERNMENT CANNOT JUSTIFY UNR'S NULLIFICATION OF FOUR DECADES OF SETTLED LAW.

The Government's Brief in Opposition to Keene's Petition for Certiorari fails to rebut Keene's argument that the *UNR* decision erroneously swept aside approximately four decades of settled precedent construing 28 U.S.C. §1500 (1988) ("§1500"). The Government merely intones that the Federal Circuit has spoken, but it ignores the practical problems which the decision creates, and fails to address *UNR*'s effect on litigants with legitimate claims against the Government who have relied upon the precedent overturned.

The Government is mute as to the fact that Congress, by declining to enact contrary legislation over the years, has ratified the settled law which was overturned by *UNR*: *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966) ("*Tecon*"); *Boston Five Cents Savings Bank v. United States*, 864 F.2d 137 (Fed. Cir. 1988) ("*Boston Five Cents*"); *Brown v. United States*, 358 F.2d 1002 (Ct. Cl. 1966) ("*Brown*"); *Hossein v. United States*, 218 Ct. Cl. 727 (1978) ("*Hossein*"); and *Casman v. United States*, 135 Ct. Cl. 647 (1956) ("*Casman*"). Indeed, Congress has never offered any signal that it questioned the interpretations of §1500 contained in that chain of decisional law. The Federal Circuit erred in overruling established precedent that had enjoyed Congressional approval.

Congressional reenactment of a statute absorbs the decisional law which has interpreted it. *Pierce v. Underwood*, 487 U.S. 552, 567 (1988). When Congress enacted the Federal Courts Improvement Act in 1982, the only amendment it made to §1500 was the substitution of "United States Claims Court" to replace the former title "Court of Claims." Federal Courts Improvement

Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 (codified as amended in scattered sections of the United States Code) (1982). In fact, the very purpose of the Improvement Act was resolution of procedural complexities in Claims Court actions. S. Rep. No. 97-275, 97th Cong., 2d. Sess. 1 (1982). Congress's decision to make only a cosmetic adjustment to the statute is the plainest evidence that it agreed with the rules interpreting §1500 borne in *Tecon*, *Boston Five Cents*, *Brown*, *Hossein* and *Casman*. *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) teaches that the "legislative power is implicated" when Congressional silence follows the judicial interpretation of a statute.³ *Stare decisis* commands obeisance to the settled construction of a statute which Congress has declined to modify.

When Keene voluntarily dismissed its third-party action in *Miller v. Johns-Manville Products Corp.*, No. 78-1283E (W.D. Pa. 1979) (Pet. App. at I-1) ("*Miller*") and brought its Claims Court action in 1979, *Keene Corp. v. United States*, No. 579-79C (Ct. Cl. 1979) (Pet. App. at H-1) ("*Keene I*"), *Tecon* had been settled law for over a decade and *Casman* for over two decades. Because Keene voluntarily dismissed *Miller*, the only action it had pending against the Government in 1979 was *Keene I*. Keene's subsequent federal district court actions against the Government based on tort and seeking other remedies not available in the Claims Court, were permissible under *Tecon* and *Casman*. A law review article relied upon by the Government recognizes that "two suits are sometimes necessary in the complex world of remedies against the United States and its officers." Schwartz, *Section 1500 of the Judicial Code and*

³ The significance of Congressional silence was a determining factor in *Flood v. Kuhn*, 407 U.S. 258, 282-84 (1972) (admitting that the Court's grant of antitrust immunity to professional baseball is an "aberration that has been with us now for half a century, one heretofore deemed fully entitled to the benefit of *stare decisis*"). See also *Southwest Marine of San Francisco v. United States*, 896 F.2d 532, 534 (Fed. Cir. 1990) (refusing to find that the Federal Courts Improvement Act created an exception to district courts' exclusive jurisdiction over government maritime contracts without evidence of "clear congressional intent").

Duplicate Suits Against the Government and its Agents, 55 Geo. L.J. 573, 599 (1967), cited in Brief for the United States in Opposition, *Keene Corp. v. United States*, petition for cert. filed, (No. 92-166, July 22, 1992) at 9-10 ("Gov't Br.").⁴

If the Federal Circuit now disagrees with the very rules it has promulgated over the past forty years, it cannot modify §1500 freehandedly; the court must look to Congress for an authoritative revision of that law. The Government's Brief is silent on the limits of a court's authority to overrule Congress under these circumstances. It is noteworthy that the Schwartz article advocates legislative reform of §1500 or, alternatively, use of equitable estoppel or the doctrine of *res judicata* to achieve equitable results. *Id.* at 584, 589-99. Thus legislative action, not the sweeping judicial reform of the Federal Circuit's opinion in *UNR*, is the appropriate means of simplifying issues under §1500.

⁴ The Government's citations to *Corona Coal Co. v. United States*, 263 U.S. 537 (1924), Gov't Br. at 8-12, are inapposite: that decision ruled on an issue completely distinguishable from Keene's position. *Corona Coal* involved a Claims Court litigant who filed an action in federal district court after the Claims Court had rendered judgment against it.

Similarly, the Government's reliance on *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932), Gov't Br. at 9, is misplaced because that decision specifically acknowledged that parallel actions in the Court of Claims and in federal district court might be necessary for full satisfaction of claims which cannot be combined in a single forum. Indeed, the *Matson* Court pointed out that §1500's predecessor could only "require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be res adjudicata in the suit pending in the Court of Claims" *Id.* at 356.

The Government's misleading quote on the "plain meaning" rule as discussed in *Corona Coal*, Gov't Br. at 12, invites reflection on Justice Holmes' earlier caveat that a court must never assume that "the jurisdiction of the Court of Claims is to be construed strictly and read with an adverse eye." *United States v. Emery*, 237 U.S. 28, 32 (1915).

II.

THE GOVERNMENT MISCHARACTERIZES KEENE'S ACTIONS AGAINST THE UNITED STATES.

The Government's rendering of the facts distorts the chronology of Keene's litigation against the Government: it suggests that Keene attempted to abuse the judicial process by playing a litigation "shell game" in various federal courts. For example, the Government's Brief implies that Keene's FTCA action preceded the filing of its Claims Court action, which is simply false.

The Government's Brief masks several important facts. Keene's voluntary dismissal of its third-party complaint against the Government in *Miller* a few months after it was brought reduced that action to a nullity; the *Miller* complaint dissolved as if it had never existed, and the Claims Court should not have based its dismissal of Keene's action on *Miller*.⁵ Also, Keene's FTCA actions against the Government did not fall within the prohibition of §1500 because they sought remedies which the Claims Court cannot provide. Keene's Claims Court actions were based on claims arising out of Keene's contracts with the Government, which a federal district court could not entertain, and the Claims Court could not exercise jurisdiction over the causes alleged in Keene's FTCA actions which were based on tort theories. *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.), cert. denied, 464 U.S. 864 (1983).

For nearly forty years, Claims Court judges have held that §1500 will not apply when a claimant's actions cannot be

⁵ See, e.g., *A.B. Dick Co. v. Marr*, 197 F.2d 498, 502 (2d Cir.), cert. denied, 344 U.S. 878, reh'g denied, 344 U.S. 905 (1952); *Navajo Tribe of Indians v. United States*, 601 F.2d 536, 540 (Ct. Cl. 1979), cert. denied, 444 U.S. 1072 (1980). See also C. Wright & A. Miller, *Federal Practice & Procedure: Civil* § 2367 at 184-87 (1971), and at 54-55 (1992 Pocket Part).

Ironically, the Government was unaware that Keene had filed its solitary third-party action in *Miller*; it was counsel for Keene who discovered that complaint and brought it to the attention of the Claims Court.

consolidated in the same court. *Prillman v. United States*, 220 Ct. Cl. 677 (1979), *Allied Materials & Equipment Co. v. United States*, 210 Ct. Cl. 714 (1976), and *Casman v. United States*, 135 Ct. Cl. 647 (1956). This was the state of the law when Keene approached the Claims Court; nevertheless, *UNR* summarily disregarded Keene's position, declaring that "this relies on the exception *Casman* opened up, and as of today, *Casman* and its progeny are no longer valid." *UNR*, 962 F.2d 1013, 1025 (Fed. Cir. 1992). Pet. App. at A-22.

Moreover, both Keene's FTCA actions were dismissed for lack of subject matter jurisdiction. Significantly, the Second Circuit noted that jurisdiction over Keene's claim laid exclusively within the Claims Court when it affirmed dismissal of Keene's first FTCA action. *Keene Corp. v. United States*, 700 F.2d 836, 845 n.13 (2d Cir.), cert. denied, 464 U.S. 864 (1983). The United States District Court for the District of Columbia relied on that decision when it dismissed Keene's second FTCA action. *Keene Corp. v. United States*, 591 F. Supp. 1340 (D.D.C. 1984), aff'd sub nom., *GAF Corp. v. United States*, 818 F.2d 901 (D.C. Cir. 1987). Under the rule of *Connecticut Dep't of Children & Youth Services v. United States*, 16 Cl. Ct. 102 (1989), the Federal Circuit should have heeded the rationale of *Brown* and held that, following such a dismissal, "section 1500 would no longer apply" *Id.* at 102-03.

Finally, the Claims Court's review of the *Keene I* and *Miller* litigation was not "fact-sensitive" as the Government's Brief suggests; the merits of those cases were never addressed. The Claims Court observed only that "[a]pplication of section 1500 does not call for examining the record of the district court in this matter." *Keene Corp. v. United States*, 17 Cl. Ct. 146, 159 (1989), Pet. App. at E-25 (emphasis added). The allegations and the operative facts in the two actions were different, the damages in *Keene I* were of a far greater magnitude than those sought in *Miller*, and Keene's liability in *Miller* had not even been established when it impleaded the Government.⁶

⁶ Furthermore, when the Second Circuit dismissed Keene's FTCA action, it chided Keene for its "fail[ure] to implead the United States into those suits which were brought against it in the federal courts." 700 F.2d at 843 n.10.

Keene has not spent the past decade shuttling in and out of federal courthouses to file vexatious claims, as the Government's Brief suggests. Gov't Br. at 13. On the contrary, Keene has attempted to tailor its claims to the proper forum; its tort and contract actions could not be consolidated in a federal district court nor in the Claims Court. *UNR*'s overruling of *Casman* has cut off Keene's channels for redress.

It is patently unfair to compel a litigant to choose between tort and contract theories at the threshold of litigation, or to force a choice between legal and equitable remedies. The rules articulated in *Tecon*, *Boston Five Cents*, *Brown*, *Hosseini*, and *Casman* were erected to protect the Government from defending the same claim in federal district court which it has already defeated in Claims Court, but not to oblige a claimant to venture blindfolded into a court which may ultimately deny jurisdiction and then preclude a determination on the merits elsewhere. See, e.g., *Boston Five Cents*, 864 F.2d at 140.

Section 1500 is a shield, not a sword for the Government to wield against claimants who litigate in good faith. §1500's purpose is to protect the Government from defending itself against parties who file and prosecute duplicative claims. *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939), cert. denied, 310 U.S. 627 (1940). But Keene did no such thing; it was never allowed to litigate its case on the merits against the Government in any forum. Keene bought BEH, its former subsidiary, for \$8 million, but now is enmeshed in mass tort litigation of such magnitude that it offers 80 per cent of its net assets to satisfy meritorious asbestos personal injury claims. Keene simply seeks its day in court to adjudicate the Government's responsibility for these injuries; sovereign immunity should not obtain through a judicial reinterpretation of law which Congress has ratified, and which would grant Keene that opportunity.

CONCLUSION

For the reasons set forth herein, and in the prior Petition, Petitioner Keene prays that the Petition for a Writ of Certiorari be granted.

Respectfully submitted,

JOHN H. KAZANJIAN

Counsel of Record

IRENE C. WARSHAUER

MARY BETH GORRIE

Counsel for Petitioner

Keene Corporation

ANDERSON KILL OLICK

& OSHINSKY, P.C.

666 Third Avenue

New York, New York 10017

(212) 850-0700

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

BRIEF AMICI CURIAE OF THE
CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA
AND THE SOUTHERN UTE INDIAN TRIBE
IN SUPPORT OF PETITIONER

RICHARD DAUPHINAIS
Native American Rights Fund
1712 N St., N.W.
Washington, D.C. 20036
(202) 785-4166
Counsel of Record

YVONNE T. KNIGHT
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760
*Attorney for the Cheyenne-Arapaho
Tribes of Oklahoma*

SCOTT B. McELROY
GREENE, MEYER & McELROY, P.C.
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 442-2021
*Attorney for the Southern Ute
Indian Tribe*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-166

KEENE CORPORATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**

**BRIEF AMICI CURIAE OF THE
CHEYENNE-ARAPAHO TRIBES OF OKLAHOMA
AND THE SOUTHERN UTE INDIAN TRIBE
IN SUPPORT OF PETITIONER**

Interests of Amici Curiae

The Cheyenne-Arapaho Tribes of Oklahoma and the Southern Ute Indian Tribe submit this brief *amici curiae* in support of the Petition for Writ of Certiorari filed by petitioner, Keene Corporation. Keene and the United States have consented to the filing of this brief and their letters of consent have been filed with the Court.

The United States holds oil and gas resources in trust for the Cheyenne-Arapaho Tribes of Oklahoma. In 1976 the Tribes entered into five-year oil and gas leases with two oil companies. As those leases were about to expire, the government approved, without Tribal consent, communitization agreements that would have extended the terms of the oil and gas leases on Tribal land. The Tribes filed suit for agency review and injunctive relief in federal district court. The Tribes sought to void the government's approval and to keep the agreements from taking effect. The Tribes later filed an action in the United States Claims Court to recover any damages resulting from the government's approval of the agreements. The Claims Court suit was stayed pending the outcome of the district court litigation. The district court ruled for the Tribes in 1989 and that decision has been affirmed by the Tenth Circuit Court of Appeals. *Cheyenne-Arapaho Tribes of Oklahoma v. The United States of America, et al.*, 966 F.2d 583 (10th Cir. 1992). The government has moved to dismiss the Tribes' Claims Court case on the basis of 28 U.S.C. §1500 and the Federal Circuit's recent decision in *UNR Industries, Inc., et al. v. The United States*, 962 F.2d 1013 (Fed.Cir. 1992) ("UNR").¹

The Southern Ute Indian Tribe is the beneficial owner of coal underlying the Southern Ute Indian Reservation. The United States holds legal title to the coal as trustee for the Tribe but in many instances

¹ That is the *in banc* opinion of the Federal Circuit. The earlier panel decision is reported at *UNR Industries, Inc. v. United States*, 911 F.2d 654 (Fed.Cir. 1990). The Claims Court opinion is reported at *Keene Corporation v. United States*, 17 Cl.Ct. 146 (1989).

the remainder of the estate is privately owned. On those lands, oil companies and landowners have begun to develop substances commonly known as coalbed methane from the Tribe's coal without Tribal consent. Although holding the coal in trust, the federal government has refused to protect the Tribe's resources. The Tribe filed suit in federal district court against the oil companies and the landowners to stop development of the coalbed methane in the absence of Tribal consent. The Tribe also sued the Secretary of the Interior (and subordinates) for injunctive relief. The Tribe seeks to force the Department of the Interior to carry out the government's duties as trustee for the Tribe. The Tribe filed a second suit in the Claims Court for damages for the United States' past failure to protect the Tribe's interest in coalbed methane. The government has moved to dismiss the Tribe's Claims Court action based on 28 U.S.C. §1500 and the *UNR* decision.

Both the Cheyenne-Arapaho Tribes of Oklahoma and the Southern Ute Indian Tribe have a significant interest in supporting the consistent and longstanding interpretation of 28 U.S.C. §1500 made by the United States Court of Claims, the Federal Circuit Court of Appeals, and the United States Claims Court before the Federal Circuit's decision in *UNR*. The Tribes relied on that interpretation in proceeding against the federal government in United States district courts and in the United States Claims Court. If the *UNR* decision stands, the Tribes' Claims Court suits would be subject to dismissal.

Argument

The *In Banc UNR Industries* Decision Should be Reviewed Because it Overturns Established Precedent That Correctly Interpreted 28 U.S.C. §1500

The *UNR Industries* decision involves the interpretation of 28 U.S.C. §1500. In its present form that statute provides:

The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Since its original enactment in 1868, the Court of Claims, the Claims Court and the Federal Circuit have been called upon to construe §1500 many times. In doing so, those courts consistently concluded that §1500 allowed litigants to simultaneously assert claims for non-monetary equitable relief in the federal district courts and claims for damages in the Court of Claims and, later, the Claims Court. See *e.g. Casman v. United States*, 135 Ct.Cl. 647 (1956); *Boston Five Cents Savings Bank v. United States*, 864 F.2d 137 (Fed.Cir. 1988); *Marks v. United States*, 24 Cl.Ct. 310 (1991).²

² See also *Allied Materials & Equipment Company, Inc. v. United States*, 210 Ct.Cl. 714 (1976); *Mary L. Prillman v. United States*, 220 Ct.Cl. 677 (1979); *Truckee-Carson Irrigation District*

In such cases, the Court of Claims and Claims Court routinely stayed proceedings until the district court action was complete. See *e.g. Prillman*, 220 Ct.Cl. 677; *Truckee-Carson Irrigation District*, 223 Ct.Cl. 684. Thus the government would not have to defend two actions at the same time. Further, the resolution of legal and factual issues in the district court would be binding on the parties in the Claims Court and there would be no basis to relitigate those issues.

The *Casman* interpretation of §1500 became the "settled law" of the Court of Claims. *Truckee-Carson Irrigation District*, 223 Ct.Cl. at 685. When Congress created the Claims Court in the Federal Courts Improvement Act of April 2, 1982, 96 Stat. 25 (codified as amended in scattered sections of the United States Code), §1500 was amended to make it applicable to that Court. Congress made no changes to §1500 in response to the longstanding *Casman* interpretation and the consistent line of precedent following that interpretation. And, as noted the Claims Court and Federal Circuit continued to adhere to the *Casman* interpretation after 1982. *Boston Five Cents Savings Bank*, 864 F.2d 137; *Marks*, 24 Cl.Ct. 310.

In the *in banc UNR* decision, however, the Federal Circuit made a sweeping change in the interpretation of §1500. Despite the exceptions to the application of §1500 found by earlier courts, the Federal Circuit ruled that §1500 absolutely precluded Claims Court

v. United States, 223 Ct.Cl. 684 (1980); *City of Santa Clara, California v. United States*, 215 Ct.Cl. 890 (1977); *Pitt River Home and Agricultural Cooperative Association v. United States*, 215 Ct.Cl. 959 (1977); *Minoui Hossein v. United States*, 218 Ct.Cl. 727 (1978); *The Deltona Corp. v. United States*, 222 Ct.Cl. 659 (1980).

jurisdiction whenever a claim based on the same set of facts was pending in another court. *UNR*, 962 F.2d at 1021. In addition, and although the *Casman* interpretation did not appear to be before the court, the Federal Circuit overruled "cases like *Casman*, 135 Ct.Cl. 647, *Hosseini*, 218 Ct.Cl. 727, and *Boston Five Cents*, 864 F.2d 137". *UNR*, 962 F.2d at 1022 n.3.

The result for amici Cheyenne-Arapaho Tribes and the Southern Ute Tribe is that they face dismissal of their pending Claims Court actions. Although the Cheyenne-Arapaho Tribes have, so far, established a breach of the government's trust responsibility they would be unable to obtain damages for that breach. They could not assert a damages claim in the district court because that court's jurisdiction is limited to actions for less than \$10,000. 28 U.S.C. §1346(a)(2). They could not refile their Claims Court case because the six year statute of limitations, 28 U.S.C. §2501, would have run on their claims. The litigation of the Southern Ute Tribe is at an earlier stage but the Tribe faces the same prospect if its Claims Court suit is dismissed and its district court action takes more than six years to complete.

Indeed, all Indian tribes are adversely affected by the Federal Circuit's decision to overturn the *Casman* interpretation of §1500 in *UNR*. The federal government has a pervasive presence in the day-to-day activities of tribes. If a tribe is aggrieved by the action or inaction of the government, the practical effect of the *UNR* decision is to force tribes to choose between review of the government's actions and injunctive relief in the district courts or damages in the Claims Court. If a tribe chooses to pursue injunctive relief and that litigation takes more than six years, the tribe

will be precluded by the statute of limitations from filing a second suit for damages in the Claims Court. That cannot be the result intended by Congress.³ Section 1500, the Tucker Act, 28 U.S.C §§1491 and 1346, the Indian Tucker Act, 28 U.S.C §1505, and the Administrative Procedure Act, 5 U.S.C. §§551-559 and 701-706, must be construed reasonably and harmoniously as the Court of Claims, Claims Court, and Federal Circuit did prior to the *UNR* decision.

³ Chief Judge Nies, concurring in *UNR*, 962 F.2d at 1025, and Judge Plager, dissenting, *Id.* at 1026, both expressed concern about the statute of limitations implications of the Federal Circuit's decision.

Conclusion

For the foregoing reasons, the Supreme Court should accept review of the Federal Circuit's *in banc UNR Industries* decision.

Respectfully submitted,

RICHARD DAUPHINAIS
Native American Rights Fund
1712 N St., N.W.
Washington, D.C. 20036
(202) 785-4166
Counsel of Record

YVONNE T. KNIGHT
Native American Rights Fund
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760
*Attorney for the Cheyenne-Arapaho
Tribes of Oklahoma*

SCOTT B. McELROY
GREENE, MEYER & McELROY, P.C.
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 442-2021
*Attorney for the Southern Ute
Indian Tribe*

September 1992

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TRIBES OF OKLAHOMA, THE SOUTHERN UTE INDIAN
TRIBE, AND THE COUNCIL OF ENERGY RESOURCE
TRIBES IN SUPPORT OF PETITIONER

RICHARD DAUPHINAIS
NATIVE AMERICAN RIGHTS FUND
1712 N St., N.W.
Washington, D.C. 20036
(202) 785-4166
Counsel of Record for Amici

YVONNE T. KNIGHT
PATRICE KUNESH
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760
*Attorneys for the Cheyenne-Arapaho
Tribes of Oklahoma*

SCOTT B. McELROY
GREENE, MEYER & McELROY, P.C.
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 442-2021
*Attorney for the Southern Ute
Indian Tribe*

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Interests of Amici Curiae

The decision of the Federal Circuit Court of Appeals in *UNR Industries, Inc., et al. v. The United States*, 962 F.2d 1013 (Fed.Cir. 1992) ("UNR")¹ prevents Indian tribes from effectively enforcing the federal government's trust responsibility. *Amici*, the Cheyenne-Arapaho Tribes of Oklahoma, the Southern Ute Indian Tribe, and the Council of Energy Resource Tribes (CERT) support petitioner in challenging the UNR decision.²

The United States holds oil and gas resources in trust for the Cheyenne-Arapaho Tribes of Oklahoma. In 1976 the Tribes entered into five-year oil and gas leases with two oil companies. As those leases were about to expire, the government approved, without Tribal consent, communitization agreements that would have extended the terms of the oil and gas leases on Tribal land. The Tribes filed suit for agency review and injunctive relief in federal district court. *Cheyenne-Arapaho Tribes of Oklahoma v. United States et al.*, No. CIV-84-1765-A (D.Okla. filed 1984). The Tribes sought to void the government's approval and to keep the agreements from taking effect. The Tribes later filed an action in the United States Claims Court to recover any damages resulting from the government's improper approval of the agreements. *Cheyenne-Arapaho Tribes of Oklahoma v. United*

¹ That is the *in banc* opinion of the Federal Circuit. The earlier panel decision is reported at *UNR Industries, Inc. v. United States*, 911 F.2d 654 (Fed.Cir. 1990). The Claims Court opinion is reported at *Keene Corporation v. United States*, 17 Cl.Ct. 146 (1989).

² Pursuant to Rule 37.3, written consents from counsel of record for the parties have been filed with the Clerk of the Court.

States, No. 247-87L(Cl.Ct. filed 1987). The Claims Court suit was stayed pending the outcome of the district court litigation. The district court ruled for the Tribes in 1989, holding that the government had breached its trust responsibility to the Tribes, and that decision has been affirmed by the Tenth Circuit Court of Appeals. *Cheyenne-Arapaho Tribes of Oklahoma v. The United States of America, et al.*, 966 F.2d 583 (10th Cir. 1992). The government has moved to dismiss the Tribes' Claims Court case on the basis of 28 U.S.C. §1500 and the Federal Circuit's recent decision in *UNR*, 962 F.2d 1013. Consideration of the motion has been postponed to await the decision in this case.

The Southern Ute Indian Tribe is the beneficial owner of coal underlying the Southern Ute Indian Reservation. The United States holds legal title to the coal as trustee for the Tribe but in many instances the remainder of the estate is privately owned. On those lands, oil companies and landowners have begun to develop substances commonly known as coalbed methane from the Tribe's coal without Tribal consent. Although holding the coal in trust, the federal government has refused to protect the Tribe's resources. The Tribe filed suit in federal district court against the oil companies and the landowners to stop development of the coalbed methane in the absence of Tribal consent. *Southern Ute Indian Tribe v. Amoco Production Co.*, No. 91-B-2273 (D.Colo. filed 1991). The Tribe also sued the Secretary of the Interior (and subordinates) for injunctive relief. The Tribe seeks to force the Department of the Interior to carry out the government's duties as trustee for the Tribe. The Tribe filed a second suit in the Claims Court for dam-

ages for the United States' past failure to protect the Tribe's interest in coalbed methane. *Southern Ute Indian Tribe v. United States*, No. 92-99L (Cl.Ct. filed 1992). The Claims Court has dismissed the Tribe's suit based on 28 U.S.C. §1500 and the *UNR* decision.

CERT is a national organization of over forty federally-recognized Indian tribes. CERT was founded in 1975 to provide member tribes with professional assistance in the protection, management, and development of their energy resources. Both the Cheyenne-Arapaho Tribes and the Southern Ute Indian Tribe are members of CERT.

The Cheyenne-Arapaho Tribes of Oklahoma and the Southern Ute Indian Tribe have a significant interest in supporting the consistent and longstanding interpretation of 28 U.S.C. §1500 made by the United States Court of Claims, the Federal Circuit Court of Appeals, and the United States Claims Court before the Federal Circuit's decision in *UNR*. The Tribes relied on that interpretation in proceeding against the federal government in United States district courts and in the United States Claims Court. If the *UNR* decision stands, the Tribes' Claims Court suits would be subject to dismissal and the government, although in breach of its responsibilities, would not be accountable in damages. CERT, and Indian tribes generally, have an interest in making sure that tribes have the ability to effectively enforce the federal government's fiduciary obligations to tribes.

Summary of Argument

Before the Federal Circuit's *UNR* decision, the Court of Claims, the Claims Court, and the Federal Circuit itself correctly interpreted 28 U.S.C. §1500 to

allow simultaneous suits where only nonmonetary relief was sought in federal district court and money damages were sought in the Claims Court. Congress had the opportunity to change that interpretation but has not done so. The *UNR* decision reverses the longstanding practice of the courts and Congress' endorsement of that practice. The decision will have the practical effect of barring valid damages claims against the government. Amici join petitioner in seeking reversal of *UNR*.

Argument

I. Introduction

The *UNR Industries* decision involves the interpretation of 28 U.S.C. §1500.³ In its present form that statute provides:

The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

³ 28 U.S.C.A. §1500 (West Supp. 1992). This statute is based on §1500 of the 1948 Judicial Code, Act of June 25, 1948, 62 Stat. 869; §154 of the Act of March 3, 1911, 36 Stat. 1138; R.S. §1067.

UNR is a consolidation of eight cases involving asbestos manufacturers and suppliers.⁴ In those cases, the claimants sought money damages from the government in federal district courts and, under different theories, in the Claims Court. The Claims Court dismissed the cases. *Keene Corp. v. United States*, 17 Cl. Ct. 146. The Federal Circuit reversed the dismissal. *UNR Industries v. United States*, 911 F.2d 654. In December 1990, the Federal Circuit granted the government's suggestion for rehearing in banc and vacated the judgment entered in 911 F.2d 654. *UNR Industries, Inc. v. United States*, 926 F.2d 1109 (Fed.Cir. 1990). A month later the court ordered further briefing on certain issues. *UNR Industries, Inc. v. United States*, 926 F.2d 1109 (Fed.Cir. 1991).

The *UNR* decision came down in April 1992. The Claims Court's 1989 dismissal of the *UNR* plaintiffs' cases was affirmed. The court ruled that: (1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on; (2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction, regardless of when the court memorializes the fact by order of dismissal; and (3) if the same claim has been finally disposed of by another court before the complaint is filed in the

⁴ A detailed background of the *UNR* cases is set out in the *UNR* Claims Court opinion. *Keene Corp.*, 17 Cl.Ct. at 149-155.

The *UNR* cases are related to three other asbestos cases. See *Keene Corp. v. United States*, 12 Cl. Ct. 197 (1987), *aff'd* *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed.Cir. 1988) *cert. den.* 489 U.S. 1066 (1989).

Claims Court, ordinary rules of *res judicata* and available defenses apply. *UNR*, 962 F.2d at 1021.

As noted, it appears that *UNR* involves cases where money damages were sought in the district courts and in the Claims Court. The Federal Circuit, however, went beyond the facts before it in *UNR* to rule that 28 U.S.C. §1500 divested the Claims Court of jurisdiction of a claim for money damages where the same underlying facts were the basis of a suit against the government for nonmonetary relief in federal district court. The court did so by overruling *Casman v. United States*, 135 Ct.Cl. 647 (1956) and "cases like *Casman*". *UNR*, 962 F.2d at 1022 n.3.

Amici submit that *Casman* was correctly decided and that the part of *UNR* that overruled *Casman* should be reversed.

II. Section 1500 Does Not Require the Dismissal of an Action in the Claims Court Where There is a Simultaneous Suit for Only Nonmonetary Relief in District Court

The court in *UNR* described the "judicial development" of §1500 as "erratic". *UNR*, 962 F.2d at 1019. A review of the cases, though, reveals a clear and consistent thread. From the Court of Claims' decision in *Casman*, to the Federal Circuit's decision in *Boston Five Cents Savings Bank v. United States*, 864 F.2d 137 (Fed.Cir. 1988), to the Claims Court's decision in *Marks v. United States*, 24 Cl.Ct. 310 (1991), the courts uniformly held that claimants could pursue money damages in the Claims Court and nonmonetary relief in district court. Those decisions are consistent with the purposes of §1500 and the actions of Congress over the years. The decisions allow for the pro-

tection of valid damages claims against the government that might otherwise be barred by the statute of limitations.

A. Section 1500 Was Not Enacted to Preclude Suit in the Claims Court When Only Nonmonetary Relief Is Sought in the District Court

Early on, the Court of Claims recognized that where a party sought only nonmonetary relief in the district court and damages in the Court of Claims, neither the letter nor the spirit of §1500 required dismissal of the Court of Claims action. *Casman*, 135 Ct.Cl. 647. The Court of Claims consistently followed *Casman*. *Allied Materials & Equipment Company, Inc. v. United States*, 210 Ct.Cl. 714 (1976); *City of Santa Clara, California v. United States*, 215 Ct.Cl. 890 (1977); *Pitt River Home and Agricultural Cooperative Association v. United States*, 215 Ct.Cl. 959 (1977); *Hossein v. United States*, 218 Ct.Cl. 727 (1978); *Prillman v. United States*, 220 Ct.Cl. 677 (1979); *Truckee-Carson Irrigation District v. United States*, 223 Ct.Cl. 684 (1980); *Deltona Corp. v. United States*, 222 Ct.Cl. 659 (1980).⁵ Before the *UNR* decision, the Federal Circuit and the Claims Court continued to follow *Casman*. *Boston Five Cents*, 864 F.2d 137; *Marks*, 24 Cl.Ct. 310.

The "*Casman*" interpretation is consistent with the purpose of §1500 and the broader jurisdictional

⁵ By contrast, in cases where money damages were sought in the district court and the Court of Claims or the Claims Court, the court would, in most instances, apply §1500 and dismiss the case. See e.g. *British American Tobacco Co. v. United States*, 89 Ct.Cl. 438 (1939); *cert. den.* 310 U.S. 627 (1940); *Frantz Equipment Co. v. United States*, 120 Ct.Cl. 312, 98 F.Supp. 579 (1951); *Nonella v. United States*, 16 Cl.Ct. 290 (1989).

scheme of the federal courts. The purpose of §1500 is to force a claimant to elect between suing in the Claims Court and other courts to prevent duplicative litigation. *UNR*, 962 F.2d at 1021. There is, however, no duplication when equitable relief is sought in the district court and damages are sought in the Claims Court. Although such cases may be based on the same facts, the solution is for the Claims Court to stay its hand until the district court litigation is complete. Indeed, it was the common practice of the Claims Court to do just that in these kinds of cases. *Truckee-Carson*, 223 Ct.Cl. at 685-686; *Prillman*, 220 Ct.Cl. at 679. The resolution of legal and factual issues in the district court would be binding on the parties in the Claims Court and there would be no need to relitigate those issues. See e.g. *Beverly v. United States*, 24 Cl.Ct. 197 (1991). Further, the result would be precisely the same even if §1500 applied and a claimant litigated a district court action to completion and then filed suit in the Claims Court (assuming the statute of limitations did not bar the second suit).

B. Congress Has Accepted the Interpretation of Section 1500 that Allows Simultaneous Suits Where Only Non-monetary Relief is Sought in the District Court

The *Casman* interpretation of §1500 is also consistent with the actions of Congress over the years. In 1982 Congress essentially reenacted §1500 when it created the Claims Court and amended §1500 to make it applicable to the Claims Court. The Federal Courts Improvement Act of April 2, 1982, P.L. 97-164, 96 Stat. 25, 40. Although it could have, Congress made no other changes to §1500 in 1982. Between the reenactment of §1500 in 1948 and the 1982 amendment to §1500, the Court of Claims issued eight re-

ported decisions in which it held that §1500 did not apply when a claimant sought equitable relief in the district court and damages in the Court of Claims. That is evidence of adoption by Congress of the "settled" *Casman* interpretation of §1500. *Electric Storage Battery Co. v. Shimadzu*, 307 U.S. 5, 14 (1939) ("Congress has not seen fit to amend the statute in this respect and we must assume that it has been satisfied with, and adopted, the construction given to its enactment by the courts."); *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 409, 419-420 (1986); see also *Lorillard v. Pons*, 434 U.S. 575, 580 (1978).

Moreover it is clear that during the time the *Casman* interpretation became the "settled law" of the Court of Claims, Congress was aware of the problems caused by the allocation of jurisdiction between the district courts and the Court of Claims. In both 1972 and 1982, Congress amended the Tucker Act to give the Court of Claims, and later the Claims Court, limited jurisdiction to provide affirmative relief. See 28 U.S.C. §1491(a)(2),(3). The addition of §1491(a)(3) to the Tucker Act gives the Claims Court limited authority to award equitable relief before the award of government contracts. The committee report on that amendment states, "this provision will avoid the costly duplication in litigation presently required when a citizen seeks both damages and equitable relief against the government" S.Rep. No. 97-275, 97th Cong., 2d Sess. 22, reprinted in 1982 U.S. Code Cong. & Admin. News 11, 32. In amending the Tucker Act and in establishing the Claims Court, Congress did not see fit to change the "settled" *Casman* interpretation of §1500. "Under these circumstances it is a fair as-

sumption that by reenacting without pertinent modification . . . Congress accepted the construction . . . approved by the courts." *National Labor Relations Board v. Gullett Gin Co.*, 340 U.S. 361, 366 (1950).

C. Section 1500 Should Not be Interpreted So as to Prevent the Assertion of Valid Damages Claims Against the Government

The federal district courts have jurisdiction to review federal agency action, to award equitable relief against the government, and to award damages of less than \$10,000 against the government. The Claims Court has exclusive jurisdiction to award damages of more than \$10,000 against the government. The statute of limitations for cases in the Claims Court is six years. 28 U.S.C. §2501. Under that jurisdictional scheme, the *UNR* decision will have the practical effect of barring the assertion of valid damages claims against the government.

If government activity gives rise to a cause of action for damages exceeding \$10,000, the *UNR* decision forces a claimant to choose between suing for damages in the Claims Court or suing to review and enjoin the activity in district court. If a claimant sues first in Claims Court and the court finds that the government is acting illegally, it is without jurisdiction to stop the unlawful activity. If a claimant sues first in the district court and the district court litigation takes more than six years, the claimant will be barred by the statute of limitations from filing a later suit for damages in the Claims Court.

The situations of *amici* Cheyenne-Arapaho Tribes and the Southern Ute Tribe illustrates this point. Although the Cheyenne-Arapaho Tribes have, so far, established a breach of the government's trust re-

sponsibility, see *Cheyenne-Arapaho Tribes of Oklahoma v. The United States of America, et al.*, 966 F.2d 583, they would be unable to obtain damages for that breach. They could not assert a damages claim in the district court because that court's jurisdiction is limited to actions for less than \$10,000. 28 U.S.C. §1346(a)(2). They could not refile their Claims Court case because the six year statute of limitations, 28 U.S.C. §2501, would have run on their claims. The litigation of the Southern Ute Tribe is at an earlier stage but the Tribe faces the same prospect. Its Claims Court suit has been dismissed as a result of the Federal Circuit's *UNR* decision. If the Tribe's district court action takes more than six years to complete, it too would be barred from seeking damages by the statute of limitations.

Conclusion

For the foregoing reasons, the Supreme Court should reverse that part of *UNR Industries* that overrules the *Casman* interpretation of 28 U.S.C. §1500.

Respectfully submitted,

RICHARD DAUPHINAIS
NATIVE AMERICAN RIGHTS FUND
1712 N St., N.W.
Washington, D.C. 20036
(202) 785-4166
Counsel of Record for Amici

YVONNE T. KNIGHT
PATRICE KUNESH
NATIVE AMERICAN RIGHTS FUND
1506 Broadway
Boulder, Colorado 80302
(303) 447-8760

*Attorneys for the Cheyenne-Arapaho
Tribes of Oklahoma*

SCOTT B. McELROY
GREENE, MEYER & McELROY, P.C.
1007 Pearl Street, Suite 240
Boulder, Colorado 80302
(303) 442-2021

*Attorney for the Southern Ute
Indian Tribe*

December 1992

No. 92-166

Supreme Court, U.S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

RICHARD G. TARANTO

Counsel of Record

KLEIN, FARR, SMITH
& TARANTO

2550 M Street, NW
Washington, D.C. 20037
(202) 775-0184

JOHN H. KAZANJIAN

IRENE C. WARSHAUER

MARY BETH GORRIE

ANDERSON KILL OLICK &
OSHINSKY, P.C.

666 Third Avenue

New York, New York 10017

(212) 850-0700

Counsel for Petitioner

(For Further Appearances See Reverse Side of Cover)

PETITION FOR CERTIORARI FILED JULY 22, 1992

CERTIORARI GRANTED OCTOBER 19, 1992

KENNETH W. STARR

Solicitor General

STUART M. GERSON

Assistant Attorney General

BARBARA C. BIDDLE

ROBERT M. LOEB

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 514-2217

Counsel for Respondent

6/18/92

STUART E. RICKERSON

Vice President-

General Counsel

JOHN G. O'BRIEN

Associate General Counsel

Keene Corporation

200 Park Avenue

New York, New York 10166

(212) 557-1900

Of Counsel

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| <i>UNR Industries, Inc. v. United States</i> , 926 F.2d 1109 (Fed. Cir. 1991) (Order for further briefing and argument) | Pet. App. B |
| <i>UNR Industries, Inc. v. United States</i> , 926 F.2d 1109 (Fed. Cir. 1990) (Order vacating panel decision and granting rehearing in <i>banc</i>) | Pet. App. C |
| <i>UNR Industries, Inc. v. United States</i> , 911 F.2d 654 (Fed. Cir. 1990) ("panel decision") | Pet. App. D |
| <i>Keene Corp. v. United States</i> , 17 Cl. Ct. 146 (1989) (Order granting motion for partial reconsideration) | Pet. App. E |
| <i>Keene Corp. v. United States</i> , No. 585-81C (Ct. Cl. 1981) (" <i>Keene II</i> ") ... | Pet. App. F |
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| <i>Miller v. Johns-Manville Products Corp.</i> , No. 78-1283E (W.D. Pa. 1979) (original complaint) | Pet. App. J |
| C. Order, <i>Keene Corp. v. United States</i> , No. 579-79C (Ct. Cl. May 1, 1981) (denying defendant's motion for summary judgment) . . . | JA-4 |
| D. Amended Complaint, <i>Keene Corp. v. United States</i> , 80-Civ-0401 (GLG) (S.D.N.Y. Feb. 26, 1981) | JA-6 |
| E. Opinion, <i>Keene Corp. v. United States</i> , 80-Civ-0401 (GLG) (S.D.N.Y. Feb. 26, 1981) . | JA-41 |

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

Keene I

United States Claims Court
(originally United States Court of Claims)
No. 579-79C

| DATE | EVENT |
|----------------|---|
| Dec. 21, 1979 | Original petition filed |
| Aug. 1, 1980 | Defendant's motion for summary judgment filed |
| May 1, 1980 | Order denying defendant's motion for summary judgment |
| April 20, 1984 | Defendant's motion to consolidate actions for discovery filed |
| Jan. 30, 1987 | Order directing defendant to file any motion under 28 U.S.C. § 1500 (1982) with respect to 465-83C and related cases by February 28, 1987 |
| Feb. 3, 1987 | Transcript of oral argument held on Jan. 30 |
| March 2, 1987 | Defendant's motion to dismiss filed |
| April 6, 1987 | Order granting defendant's motion to dismiss as to Johns-Manville's claims unless plaintiffs file report on dismissal of pending district court cases |
| Nov. 16, 1988 | Defendant's motion to dismiss filed |
| Dec. 15, 1988 | Plaintiff's opposition to defendant's motion for summary judgment, Exhibit 4, Appendix E (Amended Complaint, <i>Keene Corp. v. United States</i> , No. 80-0401 (S.D.N.Y.); and Appendix E, Exhibit 5 (district court opinion in <i>Keene Corp. v. United States</i> , No. 80-0401 (S.D.N.Y. Sept. 30, 1981) filed |

J.A.-2

June 7, 1989 Order granting defendant's motion to dismiss
Jan. 18, 1990 Order vacating judgment of 6/7/89
May 15, 1992 Mandate of the Federal Court of Appeals for
the Federal Circuit, affirming Claims Court
decision

Keene II

United States Claims Court
(originally United States Court of Claims)
No. 585-81C

Sept. 25, 1981 Original petition filed
April 20, 1984 Defendant's motion to consolidate actions filed
by Johns-Manville, et al.
Jan. 30, 1987 Order directing defendant to file motion to
dismiss under 28 U.S.C.S. 1500 (1982) with
respect to 465-83C and related cases
March 2, 1987 Defendant's motion to dismiss filed
April 6, 1987 Order granting defendant's motion to dismiss
Johns-Manville's claims
Nov. 16, 1988 Defendant's motion for summary judgment
filed
Dec. 15, 1988 Memorandum of Keene Corp. in opposition
to defendant's motion for summary judgment,
Exhibit 4, Appendix E (Amended Complaint),
Keene Corp. v. United States, No. 80-0401
(S.D.N.Y.), Appendix E, Exhibit 5 (District
Court opinion in *Keene Corp. v. United
States*, No. 80-0401 (S.D.N.Y. Sept. 30, 1981))
filed

J.A.-3

June 1, 1989 Opinion granting defendant's motion
June 7, 1989 Judgment
Jan. 18, 1990 Order vacating judgment of 6/7/89
May 15, 1992 Mandate of the Court of Appeals for the
Federal Circuit affirming Claims Court
decision

IN THE UNITED STATES COURT OF CLAIMS

No. 579-79C

FILED

MAY 1 1981

KEENE CORPORATION

COURT OF CLAIMS

v.

THE UNITED STATES

Paul C. Warnke, attorney of record, for plaintiff. Harold D. Murry, Jr., Don Scott De Amicis, Clifford & Warnke, Jerold Oshinsky, and Anderson Baker Kill & Olick, of counsel

Paul M. Honigberg, with whom was Acting Assistant Attorney General Thomas S. Martin, for defendant. Andrea Salloom and Esther G. Boynton, of counsel.

Before DAVIS, NICHOLS and SMITH, Judges.

ORDER

PER CURIAM: This case comes before this court on (1) defendant's motion for summary judgment and (2) plaintiff's motion for leave to file its first amended petition. Oral argument has been had and the court has also considered all the various written submissions. On the presentation made to us we are satisfied that (a) there are disputed issues of material fact which cannot be adequately resolved on the slight record before us or by judicial notice at this stage, and which therefore call for further proceedings in the Trial Division (including consideration of those matters (if any) which may be appropriately noticed judicially) and (b) the first amended petition states a claim cognizable by this court if proved, and therefore should be filed. Accordingly, it is ordered that defendant's motion for summary judgment is denied without prejudice, plaintiff is granted leave to file its first amended petition, the first amended petition is accepted for filing and the case is returned to the Trial

Division for further proceedings on the amended petition.¹ Though we have decided that the amended petition survives the equivalent of a motion to dismiss, the trial judge has full authority, in his discretion, to order a more definite statement or to take such other action as he deems appropriate to focus the issues more clearly or definitely. The trial judge also continues to have, of course, the full authority granted him by the rules.

¹ Plaintiff's motion for leave to file its supplemental memorandum in opposition to defendant's motion for summary judgment is granted and we have considered it. As indicated at the oral argument, defendant has already been granted leave to file a memorandum in response to plaintiff's supplementary memorandum. Defendant has filed such a reply and we have also considered it.

MAY 1 - 1981

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
KEENE CORPORATION, : Civil Action No.
: 80-Civ.-0401GLG
Plaintiff, :
-against- : AMENDED
: COMPLAINT
THE UNITED STATES OF AMERICA, :
:
Defendant. :
----- x

Plaintiff, Keene Corporation, by and through its attorneys, Anderson Russell Kill & Olick, P.C., for its complaint, alleges upon knowledge with respect to its own acts and upon information and belief as to all other matters, as follows:

COUNT I

Nature of the Claim

1. This complaint seeks damages and other relief against the United States of America for injury, indemnity, contribution or apportionment arising from negligent or wrongful acts or omissions of or breaches of duty by said defendant.

Jurisdiction and Keene's Identity

2. Plaintiff Keene Corporation ("Keene") is a corporation organized under the laws of New York and has its principal place of business at 200 Park Avenue, New York, New York.

3. Jurisdiction arises under 28 U.S.C. §§1346(b) and 2671 *et seq.*, alternatively, under the general admiralty and maritime law of the United States of America, 28 U.S.C. §1333, the Suits in Admiralty Act, 46 U.S.C. §§741-52, the Extension of Admiralty Jurisdiction Act, 46 U.S.C. §740, and the Public Vessels Act, 46 U.S.C. §781-90, and, alternatively, under 28 U.S.C. §1331 and the common law.

4. Ehret Magnesia Manufacturing Company ("Ehret") was formed in Pennsylvania in 1899. Baldwin-Hill Company was formed in New Jersey in 1935. Baldwin-Ehret-Hill, Inc. ("B-E-H") was a Pennsylvania corporation formed in 1959 as a result of the statutory merger of Ehret and Baldwin-Hill Company. B-E-H and its predecessors, Ehret and Baldwin-Hill, manufactured and sold thermal insulation products, some of which contained asbestos fibers.

5. In February 1968, Keene acquired substantially all of the outstanding stock of B-E-H, making B-E-H a subsidiary of Keene. B-E-H was operated as a Keene subsidiary until 1970.

6. In January 1970, there was a statutory merger between B-E-H and a wholly-owned subsidiary of Keene named Keene Building Products Corporation ("KBPC"). KBPC continued to operate the businesses of B-E-H as a subsidiary of Keene.

7. In October 1974, KBPC transferred a substantial portion of its assets and liabilities of Keene. The transferred liabilities included only those which were known and which related to the manufacture and installation of thermal insulation products. Those retained by KBPC related to the manufacture of certain noise control products and had nothing whatsoever to do with insulation products. Subsequent to the transfer of assets and liabilities but still in October 1974, the stock of KBPC was sold to a third party, KBPC thus ceasing to be a subsidiary of Keene. The assets acquired by Keene from KBPC were thereafter operated by Keene as a division known as the Keene Insulation and Contracting Division. In 1975 and 1976, the contracting operations and all but one manufacturing plant of the Keene Insulation and Contracting Division were sold or closed. Keene, apart from its subsidiary, has never and does not now make or sell any thermal insulation products containing asbestos.

Keene's Injury

8. More than 6,000 lawsuits have been commenced against Keene, KBPC and/or its predecessors by persons alleging personal injury or death from inhalation of asbestos fibers contained

in thermal insulation products allegedly manufactured or sold by B-E-H or KBPC, or their predecessors.

9. Keene has denied and continues to deny the allegations of all complaints which seek to impose upon it damages as a result of the sale or use of products containing asbestos fibers. Notwithstanding such denial, a court may nevertheless impose liability upon Keene, and because of the very expensive, uncertain and time-consuming nature of litigation, Keene has been compelled to enter and will continue to enter into reasonable settlements in appropriate cases. In addition, as a result of such actions, Keene has and will continue to incur expenses, including increased expenses relating to insurance coverage, and has and will be compelled to pay reasonable sums to defend such actions.

10. Keene has presented its claims herein to the appropriate agencies of the defendant.

11. By letter dated July 27, 1979, defendant, by its Department of Justice, rejected these claims.

The Nature of the Claims Against Keene

12. In the actions against Keene the plaintiffs (hereinafter referred to as the "claimants") have alleged exposure to asbestos fibers over their work histories commencing as early as the mid-1930's.

13. (a) Most of the claimants were involved in installing high temperature thermal insulation around pipes and boilers on naval ships, on vessels in navigable waters, and in power plants and other industrial and commercial plants, including refineries.

(b) Various claimants have alleged that at the times relevant herein, they were engaged in maritime employment and in performing shipbuilding and ship repair on board ships in navigable waters of the United States.

(c) Various claimants have alleged that at the times relevant herein, they were engaged in maritime employment and

in performing shipbuilding and ship repair on shore alongside ships in navigable waters of the United States.

14. Most of the claimants who engaged in the installation of thermal insulation were either employees of the defendant working in U.S. naval shipyards or employees working in private shipyards under contract to the U.S. Navy, an agency of the United States.

15. In the actions against Keene the complaints typically have alleged that:

(a) the claimant worked with or around thermal insulation products containing asbestos;

(b) in the course of his work the claimant cut asbestos-containing thermal insulation with a saw or a knife, ripped out old asbestos-containing thermal insulation preparatory to installing new such insulation, and/or mixed asbestos-containing cement prior to application;

(c) all of the foregoing activities created airborne dust, containing asbestos fibers;

(d) the claimant inhaled such dust; and

(e) such inhalation caused asbestosis or other harmful conditions.

Relationship Between Keene and the Defendant

16. At the times relevant herein, defendant United States of America owned and operated naval shipyards for the construction and repair of its naval vessels, in which various claimants were employed at times that they were incurring their alleged injuries.

17. At the times relevant herein, defendant also utilized private shipyards for the construction and repair of its naval vessels (hereinafter "contract shipyards"), in which various claimants were employed at times that they were incurring their alleged injuries.

18. In both its own naval shipyards and in its contract shipyards, defendant supervised and regulated the labor practices of the workers employed therein and determined and specified the manner and application of products containing asbestos in its naval vessels.

19. Defendant promulgated health standards and minimum safety requirements for both its own shipyards and its contract shipyards, and conducted industrial health inspections of such shipyards for the purpose of determining the existence of any safety hazards therein.

20. At the times relevant herein, defendant promulgated specifications requiring the inclusion of asbestos fiber in thermal insulation products to be purchased by its naval shipyards or its contract shipyards, for use in its naval vessels.

21. At the times relevant herein, defendant promulgated specifications requiring the inclusion of asbestos fiber in thermal insulation products to be purchased by defendant or by private parties for use in projects, either funded by defendant, in whole or in part, or otherwise subject to defendant's control and regulation, on which claimants may have been employed.

22. As used herein, the term "control" shall be given its usual and accepted meaning, including, but not limited to, the circumstance that if defendant could require the use of asbestos-containing thermal insulation at any facility, that facility was subject to defendant's control.

23. At times relevant herein, defendant sold asbestos to KBPC and its predecessors.

24. KBPC and its predecessors incorporated the asbestos purchased from defendant into certain of their thermal insulation products without any alteration of such asbestos.

25. At times relevant herein, KBPC and its predecessors sold their thermal insulation products, incorporating asbestos purchased from the defendant, to defendant and to others.

26. KBPC and its predecessors used the asbestos supplied to them by the defendant in the manner for which said asbestos was intended or in a manner reasonably foreseeable by the defendant.

27. The claimants have alleged injury from exposure to thermal insulation which allegedly contained asbestos fibers supplied to KBPC and its predecessors by the defendant.

28. The allegations comprising the factual background set forth in paragraphs 29 through 75 below were for the most part unknown to Keene and KBPC and its predecessors until after the proceedings alleged herein had been initiated by the claimants.

Factual Background

29. Beginning at least as early as 1934, the defendant had been provided with a draft study indicating that exposure to asbestos dust caused a pulmonary fibrosis which was demonstrable on X-ray films.

30. In or about January 1935, the U.S. Public Health Service, an agency of the defendant, published this study on the negative effects of the inhalation of asbestos dust on the lungs of workers in the asbestos textile industry.

31. Nevertheless, in 1934, the U.S. Navy commenced the development of asbestos insulating materials.

32. By 1937, defendant had adopted the use of insulating materials containing asbestos in its naval vessels.

33. In or about 1938, the U.S. Public Health Service published a study of asbestosis in the asbestos textile industry. The objectives of the study were: to determine the effects of long-continued inhalation of asbestos dust on the human body; to identify the manufacturing processes that create dust; to recommend practices, and, when necessary, equipment, that would reduce the

dust exposure of workers; and to discover what concentrations of asbestos dust, if any, could be tolerated without injury to health. This study concluded that:

(a) asbestos dust exposure could be held responsible for the cases of pneumoconiosis that had been found in textile factories; and

(b) because clear-cut cases of asbestosis were found only in conjunction with dust concentrations exceeding 5 million particles per cubic foot ("p.p.c.f."), and not at lower concentrations, until better data were available, 5 million p.p.c.f. could be regarded as the threshold limit value ("TLV") for asbestos dust exposure in asbestos factories.

34. The above study urged precautionary measures and elimination of hazardous exposures as follows:

(a) dust control at the point of origin by means of local exhaust hoods so that no dust could reach the breathing zone of workers or contaminate the general air;

(b) clean air should replace the dust-laden air removed by the exhaust systems;

(c) workers entering rooms where dust conditions existed should be equipped with approved respirators; and

(d) periodic studies of the condition of the working environment should be conducted to determine whether existing control methods remained adequate.

35. At least as early as 1940, defendant was aware of the hazards of asbestos dust exposures to insulation workers employed in its naval shipyards and was conducting X-ray examinations of the lungs of such workers for evidence of asbestosis. These X-rays revealed peripheral lung markings which increased over time.

36. At least as early as January 1941, the U.S. Department of Interior, Bureau of Mines, an agency of the defendant, published a list of approved respirators for protection against the inhalation of pneumoconiosis-producing dusts such as asbestos.

37. The Second World War marked the beginning of a concentrated construction program to build combat and other vessels necessary for the war effort. In 1943, defendant's shipyards employed 1,750,000 civilians. It has been estimated that altogether from 3 to 3.5 million civilians worked in defendant's shipyards during the Second World War.

38. In 1942, the American Conference of Governmental Industrial Hygienists, a quasi-official body responsible for making recommendations concerning industrial hygiene, adopted the 5 million p.p.c.f. TLV first proposed by the U.S. Public Health Service in 1938.

39. Some time prior to December 1942, the U.S. Maritime Commission, an agency of the defendant, and the U.S. Navy concurred that too little attention had been paid to matters involving the health and safety of shipyard employees and decided to conduct a survey for the purpose of developing standards to govern the health of shipyard employees throughout the United States. Dr. Phillip Drinker of the Department of Industrial Hygiene, School of Public Health, Harvard University, and representatives of the U.S. Navy Bureau of Medicine and Surgery toured shipyards throughout the United States for the purpose of presenting to the shipyard industry, including the Navy, minimum standards for the protection of the health of shipyard employees.

40. In or about December 1942, as a result of the tour by Dr. Drinker and his associates, it was determined, *inter alia*, that:

(a) asbestosis had occurred in shipyards utilized for the construction or refitting of defendant's naval vessels and was likely

to occur again because asbestos was being handled with little or no precautions by insulation workers;

(b) the preventative programs then employed in such shipyards had been ineffective; and

(c) the asbestos health hazard could be controlled by enforcing appropriate ventilation standards in conjunction with mandatory, periodic examinations of shipyard employees.

41. In February 1943, the U.S. Navy and the U.S. Maritime Commission promulgated "Minimum Requirements for Safety and Health in Contract Shipyards". This report specifically identified asbestosis as a hazard of any operation which gave rise to asbestos dust, but asserted that such operations could be performed safely by isolating them, providing ventilation, requiring the operators to wear respirators, and conducting periodic medical examinations.

42. Pursuant to the above report, each shipyard holding contracts with the U.S. Navy and Maritime Commission was given notice that the Maritime Commission would make available safety and industrial health consultants charged with the coordination and supervision of the safety and health programs of the two agencies and that each such shipyard was to cooperate with the assigned consultants and to fully comply with the promulgated minimum standards. These standards required, *inter alia*, the:

(a) appointment of a full time safety director and support staff for each contract shipyard;

(b) appointment of a ventilation supervisor for each shift, responsible to the safety director;

(c) exhaust ventilation adequate to remove hazardous air impurities;

(d) protective respiratory equipment for jobs involving asbestos-containing material; and

(e) assignment of his own, individual respirator to each worker requiring one.

43. During the Second World War and immediately thereafter, despite the issuance of the Minimum Requirements, the problem of asbestos dust inhalation was given low priority by defendant, and the operational control of occupational health hazards varied from shipyard to shipyard.

44. During the Second World War, neither the Navy nor the Maritime Commission enforced their own minimum requirements. This laxity and indifference carried over into the postwar era.

45. In or about 1945, a study was conducted by health consultants from the U.S. Navy and Maritime Commission of the health conditions of workers installing asbestos insulation in both government and contract shipyards.

46. This study indicated that the minimum requirements promulgated in 1943 were being violated in all of the shipyards surveyed. Exhaust ventilation was for the most part non-existent or inadequate and respirators were worn by few if any workers. The asbestos dust concentrations were far in excess of the 5 million p.p.c.f. TLV first suggested by the Public Health Service in 1938.

47. The above study again recommended that adequate exhaust ventilation and respirators were necessary to the maintenance of a low incidence of asbestosis.

48. In 1946 and 1947, the American Conference of Governmental Industrial Hygienists again recommended that the TLV for dust containing asbestos should be below 5 million p.p.c.f.

49. During the early 1950's, considerable ship modernization was undertaken in both Navy and contract shipyards, resulting in extensive worker exposure to dust from ripped-out thermal insulation containing asbestos. During this period, defendant took few if any precautions on behalf of the insulation workers.

50. The October 1962 issue of the Navy's "Safety Review" published findings that adequate precautions had not been taken at naval shipyards to protect workers against asbestosis and that shipyard insulation employees were engaged in a hazardous trade.

51. In May-June 1964, the head of the Medical Department, Long Beach Naval Shipyard ("LBNS"), stated that adequate ventilation for insulation workers was not possible to achieve with the ventilating systems available at LBNS and the workers were therefore exposed to hazardous dust counts which had resulted in asbestosis.

52. In and around 1964, dust counts made at the Norfolk Naval Shipyard ("NNS") revealed that insulators were exposed to levels of 5-50 million p.p.c.f. and occasionally higher. Recommendations of the Industrial Hygiene Division at NNS for improvement of these conditions were being ignored and had been for some time and it was unknown whether workers were wearing respirators, or wearing them in a proper manner.

53. In June 1965, NNS measured dust counts during the rip-out of asbestos insulation from naval ships. Dust counts ranging from 30 to 115 million p.p.c.f. were recorded in the breathing zone.

54. In 1965, an epidemiological study of asbestosis among insulation workers in the United States was undertaken. Evidence of pulmonary asbestosis was found in almost half the workers examined. Among those with more than forty years experience, abnormalities were found in over ninety percent. This study concluded that the installation of asbestos-containing insulation was a hazardous occupation.

55. In 1968, the American Conference of Governmental Industrial Hygienists determined that the TLV for asbestos dust should be reduced to 2 million p.p.c.f.

56. In March 1968, a study of the Industrial Hygiene Division of the San Francisco Bay Naval Shipyard ("SFBNS") indicated that insulators were being exposed to asbestos dust concentrations above the TLV then extant, during various shipboard operations, including cutting, sawing and rip-out.

57. In December 1968, the Portsmouth Naval Shipyard ("PNS") conducted an investigation of the control of asbestos dust. This investigation revealed a dust problem in the shop area, although PNS officials believed that it could be reduced to an acceptable level. Asbestos dust control aboard ship was very limited in spite of the PNS medical department's expression of strong reservations concerning this condition.

58. In February 1969, the Chief of the Navy's Bureau of Medicine and Surgery sent a letter to the Chief of Naval Operations, advising him that reports from naval shipyards indicated continuing problems concerning the control of airborne asbestos and recommended that the industrial hygiene sections of the shipyards conduct surveys for the purpose of evaluating the effectiveness of ventilation control and respiratory protective devices. Later that same year, the Bureau of Medicine and Surgery opined that even one heavy exposure to asbestos dust could be injurious.

59. In or about March 1969, dust counts taken at the Pearl Harbor Naval Shipyard ("PHNS") indicated asbestos dust exposure levels from 12 to 68 million p.p.c.f. during various operations including cutting, sawing and rip-out.

60. Later in 1969, a Navy survey of both government and contract shipyards was published, indicating that in every instance yard management was aware of the hazards attending the use of asbestos insulating materials, but had failed to exercise sufficient care necessary to seek to abate the problem.

61. This report further indicated that the wearing of respirators was not generally enforced and that dust counts were excessive due to inadequate exhaust ventilation and other improper practices.

62. The above report concluded: that considerable asbestos-containing insulation material currently was being used in naval applications; that stringent handling precautions were not being enforced; and that the use of high asbestos-containing thermal insulating materials should be curtailed due to the hazards to the health of insulation workers.

63. Recognition of the occupational health problems posed by asbestos and other physically harmful substances in part led to the passage of the Occupational Safety and Health Act of 1970 ("OSHA").

64. In February 1971, the Commander, Naval Ship Systems Command, ordered elimination of high asbestos-containing materials for all new construction, and provided that for present contracts, the charge would be issued as a full priced supplemental agreement which would result in no increase in cost and no extension of delivery dates.

65. In September 1971, the U.S. General Services Administration indicated to the Navy that it had a substantial amount of asbestos-containing material and asked the Navy not to eliminate GSA as a source of such materials.

66. During 1971 and 1972, dust counts at the PHNS and the LBNS continued to reveal asbestos dust levels well in excess of the then current TLV.

67. In 1972, the National Institute for Occupational Safety and Health adopted a new TLV in connection with OSHA. Under this new standard, which was also adopted by the Navy, exposures were limited to 2 asbestos fibers per cubic centimeter of air, based upon a count of fibers greater than 5 micrometers in length. Peak concentrations were not to exceed 10 fibers per cubic centimeter of air, based upon a count of fibers greater than 5 micrometers in length.

68. During 1974, naval shipyards continued to stock, order and use insulating material containing asbestos, although acceptable substitutes were available.

69. In 1975, dust counts at the Puget Sound Naval Shipyard ("PSNS") revealed asbestos dust levels far in excess of the TLV adopted in connection with OSHA.

70. As late as February 1977 through March 1978, the Navy concluded that the asbestos control procedures in its shipyards continued to be inadequate. Subsequently, in 1979, a study published by defendant's Comptroller General concluded that the Navy continued to take inadequate precautions to protect employees in its shipyards from asbestos exposures in excess of the OSHA standard.

71. Throughout the period 1974 and thereafter, the LBNS, the PSNS, the NNS, the Boston Naval Shipyard and other government shipyards, as well as contract shipyards, reported numerous cases of asbestosis and other harmful conditions.

72. During the times relevant herein, defendant believed that the inhalation of asbestos laden dust might cause asbestosis and other harmful conditions. Defendant further believed that the danger could be controlled by maintaining a modest level of exposure.

73. Defendant failed to disclose to KBPC and its predecessors its superior knowledge of the allegedly harmful character of asbestos fibers and the improper manner in which asbestos-containing thermal insulation was being utilized and installed in facilities subject to its control and regulation in violation of its own safety standards.

74. Defendant's programs to prevent asbestosis and other harmful conditions among insulation workers in facilities subject to its control and regulation have been haphazard, inadequate and/or unenforced.

75. During the times relevant herein, defendant had the duty to protect workers, including claimants, employed in facilities subject to its control and regulation, from asbestosis and other harmful conditions, but failed to exercise a sufficient degree of care to do so.

Allegations Against the Defendant

76. Defendant, as a supplier of asbestos fiber incorporated unchanged into thermal insulation products manufactured by KBPC and its predecessors, had a duty to KBPC and its predecessors to supply a safe component.

77. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials vastly exceeded that of KBPC and its predecessors.

78. Defendant failed to disclose to KBPC and its predecessors its superior knowledge of the allegedly harmful character of asbestos fiber.

79. Defendant breached its above duty to KBPC and its predecessors to supply them with safe component materials.

80. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant breached its independent duty to KBPC and its predecessors by means of negligent or wrongful acts or omissions.

81. By reason of the foregoing breach of defendant's independent duty to KBPC and its predecessors, defendant is liable to Keene for any amounts which have been, or which may be, recovered from Keene by the claimants, through settlement or judgment, and for the costs incurred by Keene as a result of the proceedings initiated by the claimants, including, but not limited to, attorneys' fees, increased insurance costs and the cost of executive time expended on such claims.

COUNT 2

82. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

83. As a supplier of asbestos fiber incorporated unchanged into thermal insulation products manufactured by KBPC and its predecessors, defendant warranted that such asbestos fiber was safe to use for this purpose.

84. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials vastly exceeded that of KBPC and its predecessors.

85. KBPC and its predecessors properly relied on defendant's aforesaid skill and judgment and upon defendant's warranty.

86. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached since the asbestos fiber supplied by defendant to KBPC and its predecessors was not safe for its intended and foreseeable use.

87. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 3

88. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

89. Defendant had the duty to provide claimants employed in facilities subject to its control or regulation with a safe place to work.

90. The above duty imposed upon defendant the further duty to warn all claimants employed at facilities subject to its control or regulation of any danger in the use of asbestos-containing thermal insulation and to provide adequate precautions for their health and safety, including the promulgation and enforcement of prophylactic health safety standards.

91. Consequently, defendant owed KBPC and its predecessors the independent duty to assure that asbestos-containing thermal insulation, manufactured by them and used in any facility subject to defendant's control or regulation, was used in a safe manner.

92. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant breached its

aforementioned duties owed to KBPC and its predecessors. Defendant further breached a similar duty owed to said claimants.

93. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 4

94. Keene repeats and realleges the allegations set forth above in paragraphs 1 to 75, inclusive.

95. Defendant, in its capacity as the employer of its independent contractors, had the duty to warn the claimant-employees of its independent contractors of any known hazards of their employment and assure that precautions were taken for their health and safety.

96. Consequently, defendant owed KBPC and its predecessors the independent duty to assure that asbestos-containing thermal insulation, manufactured by them and used by claimants employed by defendant's independent contractors, was so used in a safe manner.

97. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant breached its aforementioned duties owed to KBPC and its predecessors. Defendant further breached a similar duty owed to said claimants.

98. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 5

99. Keene repeats and realleges the allegations set forth above in paragraphs 1 to 75, inclusive.

100. Defendant, at various times relevant herein, has inspected facilities at which claimants were employed to determine whether any safety hazards existed at said facilities or in any of the thermal insulation products containing asbestos fibers located or installed therein.

101. Having undertaken to conduct such inspections, defendant assumed the duty to conduct them in a reasonable manner.

102. Consequently, defendant owed KBPC and its predecessors the independent duty to determine that asbestos-containing thermal insulation, manufactured by them and used by claimants at the various facilities inspected by defendant, was so used in a safe manner. Defendant owed a similar duty to said claimants.

103. KBPC and its predecessors relied on defendant to conduct such inspections in a reasonable manner.

104. Said inspections were conducted in a careless and negligent fashion, including defendant's failure to warn KBPC and its predecessors and the various claimants or their employers of the allegedly hazardous and dangerous character of asbestos-containing thermal insulation.

105. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant breached its aforementioned duties owed to KBPC and its predecessors. Defendant further breached a similar duty owed to said claimants.

106. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 6

107. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

108. Defendant, at various times relevant herein, has inspected its naval and contract shipyards and other facilities subject to its control and regulation at which claimants were employed, to determine whether any cognizable safety hazards existed at said facilities or in any of the products containing asbestos fibers located or installed therein.

109. By conducting such inspections, and having the authority to regulate the working conditions at such facilities, defendant

warranted to KBPC and its predecessors that adequate precautions would be taken so that thermal insulation containing asbestos, sold to defendant and others by KBPC and its predecessors and used at such facilities, would be installed or otherwise handled in a safe manner.

110. KBPC and its predecessors relied on this warranty.

111. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that defendant failed to take adequate precautions to assure that asbestos-containing thermal insulation used at the foregoing facilities was installed or otherwise handled in a safe manner.

112. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 7

113. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

114. Defendant, as the designer and issuer of the specifications requiring the use of asbestos fiber in thermal insulation products manufactured by KBPC and its predecessors for use on defendant's naval vessels and in facilities subject to defendant's control and regulation, undertook the duty to KBPC and its predecessors to design and issue a safe thermal insulation material.

115. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant performed its design and issuance functions in a negligent manner and breached its duty to KBPC and its predecessors.

116. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 8

117. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

118. As the designer and issuer of the specifications requiring the use of asbestos in thermal insulation manufactured by KBPC and its predecessors and intended for use on defendant's naval vessels and in facilities subject to its control and regulation, defendant warranted that if its specifications were complied with, satisfactory performance would result, and that thermal insulation containing asbestos, manufactured to defendant's specifications, was safe for its intended use.

119. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials, vastly exceeded that of KBPC and its predecessors.

120. KBPC and its predecessors properly relied on defendant's aforesaid skill and judgment and upon defendant's warranty.

121. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's specifications were defective and defendant's warranty was false and was breached by reason of the fact that the asbestos-containing thermal insulation, manufactured pursuant to defendant's specifications, was not safe for its intended and foreseeable use.

122. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 9

123. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

124. Asbestos-containing thermal insulation, manufactured by KBPC and its predecessors and used in defendant's naval shipyards, its contract shipyards, or other facilities, was purchased by defendant from KBPC and its predecessors and then supplied by defendant to all such shipyards or other facilities.

125. Defendant knew or had reason to know that said asbestos-containing thermal insulation was allegedly dangerous for its intended use.

126. Defendant may not have had any reason to believe that the asbestos insulation workers, for whose use said asbestos-containing thermal insulation was being supplied, would realize its allegedly dangerous character.

127. Defendant failed to exercise its duty of reasonable care to warn such asbestos insulation workers, including claimants, of the allegedly dangerous condition of the asbestos-containing thermal insulation which defendant was supplying them.

128. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 10

129. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

130. Defendant had the duty to provide claimants employed in facilities subject to its control or regulation with a safe place to work.

131. As the party which required its independent contractors to use asbestos-containing thermal insulation at various facilities, with knowledge of its alleged danger, defendant also had the duty to see that its independent contractors took the necessary precautions to protect the health of their asbestos insulation workers, including claimants, for any hazards attendant on the use of asbestos.

132. The above duties imposed upon defendant the obligation to warn all claimants employed at facilities subject to its control or regulation of any danger in the use of asbestos-containing thermal insulation and to provide adequate precautions for their health and safety, including the promulgation and enforcement of prophylactic health and safety standards.

133. As the party responsible for regulating the work practice of all such claimants and for providing them with a safe place to work, or assuring that they were so provided, defendant warranted to KBPC and its predecessors that adequate precautions would be taken so that thermal insulation containing asbestos, sold to defendant and others by KBPC and its predecessors and used at facilities subject to defendant's regulation and control, would be installed and otherwise handled in a safe manner.

134. KBPC and its predecessors relied upon this warranty.

135. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that defendant failed to take adequate precautions to assure that asbestos-containing thermal insulation, used in facilities subject to its control and regulation, was installed or otherwise handled in a safe manner.

136. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 11

137. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

138. The defendant was negligent in that it:

(a) failed to disclose to KBPC and its predecessors its superior knowledge of the allegedly harmful character of asbestos fiber and thermal insulation containing asbestos fiber;

(b) required the inclusion of asbestos fiber in thermal insulation materials used at facilities subject to its control and regulation;

(c) supplied KBPC and its predecessors with asbestos fiber for incorporation in certain of their products;

(d) supplied claimants employed at facilities subject to its control and regulation with asbestos-containing thermal insulation, without warning of its allegedly dangerous character;

(e) failed to provide claimants in its employ or employed at facilities subject to its control and regulation with a safe place to work;

(f) failed to warn the claimant-employees [sic] its independent contractors of the alleged hazards associated with handling asbestos-containing thermal insulation, or to assure that the requisite precautions were taken to protect their health;

(g) failed to conduct its inspections of facilities at which claimants were employed with reasonable care;

(h) designed, specified and issued the specifications requiring the use of asbestos fiber;

(i) promulgated a TLV for exposure to asbestos dust and was consequently under a duty to KBPC and its predecessors to promulgate a safe TLV and to enforce such a TLV, which it negligently failed to do; and

(j) failed to conduct its medical examinations of claimants, including x-rays, with reasonable care.

139. Plaintiff has been damaged by said negligence of defendant.

140. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 12

141. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 80, 83-86, 89-92, 95-97, 100-105, 108-111, 114-115, 118-121, 124-127, 130-135, 138-139, inclusive.

142. Defendant had a duty to claimants using asbestos-containing thermal insulation, manufactured by KBPC and its

predecessors, to supply KBPC and its predecessors with safe component materials, to provide a safe work place for claimants, to warn claimants in its employ and in the employ of its independent contractors, to inspect the facilities controlled by it, and to specify a safe product for claimants' use.

143. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant negligently breached its above duties to such claimants and defendant is liable to Keene for the damages alleged above in paragraph 81, since any liability of Keene based on negligence involves negligence which is secondary and passive to the active and primary negligence of defendant, who:

(a) prescribed the use of asbestos fibers in thermal insulation materials manufactured by KBPC and its predecessors for use at facilities owned by defendant, or subject to its control or regulation;

(b) supplied KBPC and its predecessors with asbestos fibers;

(c) was responsible for the health and safety of employees handling asbestos-containing thermal insulation in facilities owned by it, or subject to its control or regulation;

(d) without the requisite warning, supplied to these claimants the asbestos-containing thermal insulation which allegedly caused their injuries;

(e) was obligated to warn claimants in the employ of its independent contractors of any dangers associated with handling asbestos and to take the necessary precautions for their health and safety; and

(f) failed to conduct the aforementioned inspections with reasonable care.

144. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 13

145. Keene repeats and realleges the allegations set forth above in paragraphs 141 through 143, inclusive.

146. Defendant knew, or in the exercise of reasonable care should have known, that its asbestos and its specified products would be sold to the public, including employers of claimants, would be used by claimants and would be relied upon by such persons to be fit both for the use and the accomplishment of the purpose for which they were sold, supplied, distributed or otherwise placed in the stream of commerce; and the defendant, because of its position as seller and specifier, is strictly liable to Keene for the following reasons:

(a) Defendant, as seller and specifier, at relevant times was engaged in the business, *inter alia*, of selling asbestos and specifying asbestos products;

(b) At the time of the sale of the said asbestos and the specification of asbestos products by the defendant, defendant knew, or had reason to know, that the said asbestos would be used by KBPC and its predecessors as a user or consumer and that said asbestos and the products manufactured by KBPC and its predecessors pursuant to said specifications would be used by claimants as the ultimate users and consumers;

(c) Defendant sold the said asbestos products in a defective condition, unreasonably dangerous to KBPC and its predecessors, to others similarly engaged as users or consumers, and to the claimants as ultimate users and consumers, and throughout the many years of the claimants' exposure to and use of the said asbestos and specified products, the said asbestos and specified products were expected to and did reach the ultimate users or consumers without substantial change in the condition in which they were sold;

(d) Claimants have alleged that the said asbestos and specified products were defective in that they are incapable of being made safe for their ordinary and intended use and purpose, and said

defendant failed to give adequate or sufficient warnings or instructions about the risks, dangers, and harm inherent in said asbestos and specified products; and

(e) Claimants have alleged that the ordinary and foreseeable use of the said asbestos and specified products is an intrinsically dangerous and ultrahazardous activity.

147. If Keene is deemed liable to claimants for the injuries alleged in their complaints, then defendant is liable to Keene in strict liability.

148. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 14

149. Keene repeats and realleges the allegations set forth above in paragraphs 145 through 147, inclusive.

150. Defendant is not protected by sovereign immunity for the acts set forth above and has breached its duties to Keene under the common law.

151. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 15

152. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

153. In 1971 and on other prior occasions, KBPC and its predecessors purchased asbestos fiber from defendant, pursuant to express contracts.

154. As a supplier of asbestos fiber incorporated uncharged into thermal insulation products manufactured by KBPC and its predecessors, defendant warranted that such asbestos fiber was safe to use for this purpose.

155. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials, vastly exceeded that of KBPC and its predecessors.

156. KBPC and its predecessors properly relied on defendant's aforesaid skill and judgment and upon defendant's warranty.

157. Defendant had a duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

158. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that the asbestos fiber, supplied by defendant to KBPC and its predecessors, was not safe for its intended and foreseeable use.

159. On the basis of its superior knowledge, defendant knew, or should have known, that its breach of the foregoing warranty would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

160. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 16

161. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

162. KBPC and its predecessors sold thermal insulation containing asbestos to defendant, pursuant to express contracts.

163. Defendant had the duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

164. Defendant had the further duty to provide claimants employed in facilities subject to its control or regulation with a safe place to work.

165. As the party which required its independent contractors to use asbestos-containing insulation at various facilities, with knowledge of its alleged danger, the defendant also had the duty to see that its independent contractors took the necessary precautions to protect the health of their asbestos insulation workers, including claimants, from any hazards attendant on the use of asbestos.

166. The above duties imposed upon defendant the obligation to warn all claimants employed at facilities subject to its control or regulation of any danger in the use of asbestos insulation and to provide adequate precautions for their health and safety, including the promulgation and enforcement of prophylactic health and safety standards.

167. As the party responsible for regulating the work practice of said claimants and for providing them with a safe place to work, or assuring that they were so provided, defendant warranted to KBPC and its predecessors that adequate precautions would be taken so that thermal insulation containing asbestos, sold to defendant by KBPC and its predecessors for use at facilities subject to defendant's control and regulation, would be installed and other wise [sic] handled in a safe manner.

168. KBPC and its predecessors relied upon this warranty.

169. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that defendant failed to take adequate precautions to assure that asbestos-containing thermal insulation, used in facilities subject to its control and regulation, was installed or otherwise handled in a safe manner.

170. On the basis of its superior knowledge, defendant knew, or should have known, that its breach of the foregoing warranty would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

171. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 17

172. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

173. KBPC and its predecessors sold to defendant thermal insulation containing asbestos, pursuant to express contracts.

174. Defendant had the duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

175. Defendant, at various times relevant herein, has inspected its naval and contract shipyards and other facilities subject to its control and regulation at which claimants were employed, to determine whether any safety hazards existed at said facilities or in any of the products containing asbestos fibers located [sic] or installed therein.

176. By conducting such inspections, and having the authority to regulate the working conditions at such facilities, defendant warranted to KBPC and its predecessors that adequate precautions would be taken so that thermal insulation containing asbestos, sold to defendant by KBPC and its predecessors for use at such facilities, would be installed or otherwise handled in a safe manner.

177. KBPC and its predecessors relied upon this warranty.

178. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's warranty was false and was breached by reason of the fact that defendant failed to take adequate precautions to assure that asbestos-containing thermal insulation, used at the foregoing facilities, was installed or otherwise handled in a safe manner.

179. On the basis of its superior knowledge, defendant knew, or should have known, that its breach of the foregoing warranty would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

180. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 18

181. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

182. KBPC and its predecessors sold to defendant thermal insulation containing asbestos, pursuant to express contracts.

183. Defendant had the duty to employ its superior knowledge to limit the cost of performance of KBPC and its predecessors to that which was reasonably anticipated.

184. As the designer and issuer of the specifications requiring the use of asbestos in thermal insulation, manufactured by KBPC and its predecessors and intended for use on defendant's naval vessels and in facilities subject to its control and regulations, defendant warranted that if its specifications were complied with, satisfactory performance would result, and that thermal insulation containing asbestos, manufactured to defendant's specifications, was safe for its intended use.

185. Defendant's capacity to determine the safety, or lack thereof, of asbestos or other materials, vastly exceeded that of KBPC and its predecessors.

186. KBPC and its predecessors properly relied on defendant's aforesaid skill and judgment and upon defendant's warranty.

187. If Keene is deemed liable to any claimants for injuries alleged in their complaints, then defendant's specifications were faulty and defendant's warranty was false and was breached by reason of the fact that the asbestos-containing thermal insulation, manufactured pursuant to defendant's specifications, was not safe for its intended and foreseeable use.

188. On the basis of its superior knowledge, defendant knew, or should have known, that its breach of the foregoing warranty

would increase the cost to KBPC and its predecessors of the performance of their express contracts with defendant.

189. By reason of the foregoing, defendant is liable to Keene for the damages alleged in paragraph 81, above.

COUNT 19

190. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, inclusive.

191. The amounts which have been and will be paid by Keene to claimants in settlements and judgments should rightly be paid by defendant, since such amounts compensate claimants for injuries which resulted from defendant's negligent or wrongful acts or omissions or breaches of duty.

192. Defendant asserts that its liability to claimants who were Government employees is limited to the compensation payable under the Federal Employees' Compensation Act ("FECA"), 5 U.S.C. §§8101-8193. Defendant has refused to make any payments to such claimants other than the amounts which it claims it has paid as FECA benefits.

193. Notwithstanding its claim that it has paid FECA benefits to claimants, defendant has recouped and will continue to recoup the amounts of FECA benefits it has paid to such claimants from judgments and settlements which Keene has paid to claimants. Defendant has thus relieved itself of any responsibility for compensating claimants who were Government employees for their alleged injuries, notwithstanding defendant's significant role in causing those very injuries.

194. Since defendant's conduct caused the alleged injuries which have resulted in settlements and judgments which Keene has paid to claimants, defendant is unjustly enriched by its retention of monies paid to claimants by Keene and refunded to defendant under FECA, 5 U.S.C. §8132, and under related regulations, 20 C.F.R. §10.503.

195. By reason of the foregoing, defendant is liable to Keene for any amounts it has recouped pursuant to FECA and the aforementioned regulations.

COUNT 20

196. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, and 191 through 193, inclusive.

197. Defendant owes Keene the amount of money which has been refunded to defendant from claimants, for money had and received.

COUNT 21

198. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, and 191 through 193, inclusive.

199. Defendant's recoupment of FECA benefits it has paid to claimants from judgments and settlements paid by Keene to claimants is a direct and proximate cause of damages and injury suffered by Keene, since such recoupment increases the cost to Keene of such settlements and judgments.

200. By reason of the foregoing, defendant is liable to Keene for the amounts of money which have been, or which may be, recouped by defendant from claimants from judgments and settlements paid by Keene to claimants.

COUNT 22

201. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, and 191 through 193, inclusive.

202. Defendant's recoupment of FECA benefits constitutes a taking of Keene's property without due process of law in violation of Keene's rights under the Fifth and Fourteenth Amendments to the Constitution of the United States.

203. By reason of the foregoing, defendant is liable to Keene for the amounts of money which have been, or which may be,

recouped by defendant from claimants from judgments and settlements paid by Keene to claimants.

COUNT 23

204. Keene repeats and realleges the allegations set forth above in paragraphs 1 through 75, and 191 through 193, inclusive.

205. Without the imposition of judicial restraint, defendant will continue to recover such FECA benefits from claimants, causing Keene to bear the cost of FECA payments which ought to be borne by the defendant, causing Keene irreparable injury for which Keene has no adequate remedy at law.

WHEREFORE, Keene demands judgment against defendant:

(1) for injury, indemnity, contribution or apportionment, for any amounts which have been, or which may be, recovered from Keene by the claimants and for the cost incurred by Keene as a result of the proceedings initiated by the claimants, including, but not limited to, attorneys' fees, increased insurance costs and the cost of executive time expended on such claims, in an amount presently unknown but which is believed to be in excess of \$20 million.

(2) ordering defendant to make restitution to Keene by disgorging amounts of FECA benefits which defendant has recouped from amounts claimants have recovered from Keene, through settlement or judgment;

(3) permanently enjoining and restraining the defendant, its agencies, units, divisions, employees, officers, attorneys, agents and any other person acting or purporting to act on behalf of the defendant, from receiving any refunds of FECA payments from settlements or judgments paid to claimants; and

(4) awarding Keene the costs and disbursements of this action together with such other and further relief as to this Court may seem just and appropriate.

Dated: New York, New York
February 26, 1981

ANDERSON RUSSELL KILL & OLICK, P.C.

By /s/ Marcy Louise Kahn

A Member of the Firm

630 Fifth Avenue
New York, New York 10111
(212) 397-9700

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
KEENE CORPORATION, : Civil Action No.
: 80-Civ.-0401
Plaintiff, :
-against- :
THE UNITED STATES OF AMERICA, :
Defendant. :
-----X

DEMAND FOR A JURY TRIAL

Plaintiff demands a jury trial in the above-referenced action.

ANDERSON RUSSELL KILL & OLICK, P.C.

By /s/ Marcy Louise Kahn
A Member of the Firm
630 Fifth Avenue
New York, New York 10111
(212) 397-9700

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
KEENE CORPORATION, :
Plaintiff, :
- against - :
THE UNITED STATES OF AMERICA, : 80 Civ. 401 (GLG)
Defendant. : OPINION
-----X

A P P E A R A N C E S :

ANDERSON RUSSELL KILL & OLICK, P.C.
Attorneys for Plaintiff
630 Fifth Avenue
New York, New York 10111
By: Eugene R. Anderson, Esq.
Nicholas L. Coch, Esq.
Irene C. Warshauer, Esq.
Marcy Louise Kahn, Esq.
Frederick L. Neustadt, Esq.
Of Counsel

JOHN S. MARTIN, JR.,
United States Attorney for the
Southern District of New York
Attorney for Defendant
One St. Andrew's Plaza
New York, New York 10007
By: David M. Jones, Esq.
Assistant United States Attorney
Of Counsel

GOETTEL, D. J.:

This action arises out of the proliferation of litigation relating to exposure to asbestos that has saturated federal and state courts throughout the country.¹ Plaintiff Keene Corporation ("Keene") is a defendant in over 6000 lawsuits brought by persons alleging personal injury or death from inhalation of asbestos fibers contained in thermal insulation products alleged to have been manufactured or sold by Keene and its subsidiaries.² In this action, Keene seeks indemnity and contribution from the United States from all damages that Keene *may* sustain as a result of these lawsuits.³ The Government moves to dismiss pursuant

¹ Asbestos is a mineral fiber that appears throughout the world and which is best known for its use as an insulator against heat. It has been recognized for over fifty years that the inhalation of asbestos dust can produce a disease known generally as asbestosis. Asbestosis is technically defined as a form of pneumoconiosis. Although lawsuits arising out of exposure to asbestos are commonly referred to as asbestosis lawsuits, they actually include a variety of diseases such as lung cancer, cancer of the esophagus, cancer of the stomach, and cancer of the colon. For a general description of asbestosis and asbestosis litigation, see *Borel v. Fiberboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), and the authorities cited therein; *In Re Asbestos & Asbestos Insulation Material Products Liability Litigation*, 431 F. Supp. 906 (J.P.M.L. 1977).

² Keene alleges that it has never manufactured or sold thermal insulation products that contain asbestos. Keene was organized and formed in 1967. In 1968, Keene acquired most of the stock of Baldwin-Ehret-Hill, Inc. ("B-E-H") which, together with its predecessors, had manufactured and sold thermal insulation products containing asbestos fiber. In 1970, B-E-H was merged into a newly created Keene subsidiary, Keene Building Products Corporation ("KBPC"). Keene sold the stock of KBPC in 1974.

³ The gist of Keene's claims against the Government is that the Government utilized asbestos-containing thermal insulation up until 1979 despite the Government's knowledge, allegedly as early as 1938, of the hazards of asbestos. Keene also alleges that the Government had the knowledge and technical skill to prevent worker exposure to excessive dust concentration, but failed to take appropriate action. (The Government has reserved its right, pending decision of this motion, to move to dismiss for failure to state a claim against these novel theories of liability.)

to Rule 12(b)(1) of the Federal Rules of Civil Procedure on the ground that the Court lacks subject matter jurisdiction over the claims asserted by Keene.

In its amended complaint, Keene alleges twenty-three separate causes of action sounding in negligence, breach of warranty, strict liability, and unjust enrichment, as well as a violation of the Due Process Clause of the United States Constitution. Keene has also brought an action for breach of contract against the Government that is currently pending in the United States Court of Claims.⁴ See *Keene Corp. v. United States*, No. 579-79C (Ct. Cl., filed Dec. 21, 1979). Jurisdiction for this action is asserted under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2671 *et seq.*, alternatively under the general admiralty and maritime law of the United States of America, 28 U.S.C. § 1333, the Suits in Admiralty Act, 46 U.S.C. §§ 741-752, the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740, and the Public Vessels Act, 46 U.S.C. §§ 781-790, and alternatively, under 28 U.S.C. § 1331 and the common law. Having reviewed the thousands of pages of memoranda and affidavits submitted by the parties in connection with this motion, the Court has determined that this action is barred by the doctrine of sovereign immunity.

The Federal Tort Claims Act

The jurisdictional issue under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671 *et seq.*, stems from the requirement that the claimant file an administrative claim with the appropriate federal agency prior to instituting suit. 28 U.S.C. § 2675. Section 2675 provides in pertinent part that:

⁴ In its petition in the Court of Claims, Keene seeks damages for indemnity and contribution allegedly arising from express and implied contracts between the Government and KBPC. The Court of Claims recently denied a Government motion for summary judgment on the ground that issues of material fact remain in dispute. See *Keene Corp. v. United States*, No. 579-79C (Ct. Cl. May 1, 1981) (*per curiam*).

[a]n action shall not be instituted upon a claim against the United States for money . . . unless the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied. . . . *The provisions of this subsection shall not apply to such claims as may be asserted under the Federal Rules of Civil Procedure by third party complaint, cross-claim, or counter claim.* (Emphasis added.)

Keene contends that this action is in "the nature" of a third party complaint and consequently comes under the exception for third party claims. In the alternative, it argues that this administrative filing requirement has been satisfied.

The purpose of the administrative filing requirement is to expedite the settlement of tort claims asserted against the government and to avoid unnecessary litigation. *Adams v. United States*, 615 F.2d 284 (5th Cir.), *rehearing denied*, 622 F.2d 197 (5th Cir. 1980). The exception for third party complaints is consistent with this purpose in that it fosters the policy of the Federal Rules of Civil Procedure favoring resolution of as many claims as possible in one lawsuit. *Raybestos-Manhattan, Inc. v. United States*, No. H-78-416, slip op. at 7 (D. Conn. Feb. 15, 1979); Jacoby, *The 89th Congress and Government Litigation*, 67 Colum. L. Rev. 1212, 1219 (1967). The administrative filing requirement is jurisdictional and cannot be waived. *House v. Mine Safety Appliances Co.*, 573 F.2d 609 (9th Cir.), *cert. denied*, 439 U.S. 862 (1978); *Goulding v. United States*, 488 F. Supp. 755 (D. Ariz. 1980), *rev'd on other grounds sub nom. Poindexter v. United States*, 647 F.2d 35 (9th Cir. 1981). Moreover, because it constitutes a waiver of sovereign immunity, the procedures delineated in section 2675 must be strictly construed. *Three-M Enterprises, Inc. v. United States*, 548 F.2d 293, 295 (10th Cir. 1977); *Brown v. General Services Administration*, 507 F.2d 1300, 1307 (2d Cir. 1974), *aff'd*, 425 U.S. 820 (1976). Consequently, the exceptions for third party complaints, cross-claims, and counterclaims have likewise been strictly construed. See, e.g., *West v. United States*, 592 F.2d 487 (8th Cir. 1979); *Rosario v. American Export-Isbrandtsen Lines, Inc.*, 531 F.2d 1227

(3d Cir.), *cert. denied*, 429 U.S. 857 (1976); *Bernard v. U.S. Lines, Inc.*, 475 F.2d 1134, 1136 (4th Cir. 1973). It would appear, therefore, that Keene's contention that the Court should treat this action as being "in the nature of a third party action" should be summarily rejected. Our only hesitancy in so proceeding comes from the unpublished decision in *Raybestos-Manhattan, Inc. v. United States*, *supra*, in which Judge Blumenfeld of the United States District Court of Connecticut did something like what Keene proposes the Court do here.

Raybestos arose from highly unusual circumstances. Approximately one hundred suits had been filed against Raybestos-Manhattan, Inc. ("Raybestos"), a manufacturer of asbestos insulation products, by employees of the Electric Boat Division of the General Dynamics Corporation ("Electric Boat") for damages resulting from their exposure to asbestos. Suits against other manufacturers of asbestos products had been filed in the District of Connecticut as well. Raybestos, however, was the only manufacturer defendant that was a citizen of Connecticut. As a result, the Electric Boat employees who were citizens of Connecticut were required to sue Raybestos in Connecticut state court because there was no diversity jurisdiction.

Raybestos impleaded the United States in all of the cases filed against Raybestos in federal court. Because it could not implead the United States in the state court actions, see 28 U.S.C. § 1346(b), Raybestos filed an independent action in the district court for indemnity and contribution for the state court actions. The Government moved to dismiss for lack of subject matter jurisdiction. Judge Blumenfeld denied the motion, holding that the complaint should be treated as a third party complaint to the extent that it would bring the action within the "third party" exception of 28 U.S.C. § 2675(a).

The principal reason underlying Judge Blumenfeld's decision was to gain judicial economy in an unusual set of circumstances. The same considerations do not apply to the case at bar. All the cases filed in the District of Connecticut by employees of Electric Boat had been consolidated for purposes of discovery because of the complexity of the litigation. This action, in

contrast, involves twenty-eight separate federal districts and includes cases that are not related to shipbuilding activities. See generally *In Re Asbestos & Asbestos Insulation Material Products Liability Litigation*, 431 F. Supp. 906 (J.P.M.L. 1977). (Ironically, none of the cases brought against Keene have been filed in this district.) Moreover, unlike Raybestos, which had impleaded the United States in those cases that had been filed in federal court, Keene has generally not impleaded the United States in the federal actions brought against Keene. To the extent that cases brought against Keene have been terminated, this action would not effectuate any of the joinder policies of Rule 14 discussed by Judge Blumenfeld in *Raybestos*. In short, whereas Judge Blumenfeld avoided the duplication of litigation that would have resulted merely because some of the plaintiffs lacked diversity, this action does not avoid such duplication. Accordingly, the Court shall not treat this action as a third party action for the purposes of the section 2675(a) exception.

Keene argues in the alternative that it has satisfied the administrative filing requirements of section 2675. Prior to the commencement of this action, Keene presented an Amended Notice of Claim⁵ ("Amended Notice") listing the docket numbers of approximately 1000 lawsuits instituted against Keene for damages allegedly resulting from the exposure to asbestos fibers. This notice was presented to various agencies including the General Services Administration, the Department of Justice, the Judge Advocate General of the Army, the Department of Health, Education & Welfare, the Surgeon General, the Department of Defense, the Department of Labor, and the United States Public Health Service. By the time Keene filed this action, 1500 more lawsuits had been filed against it. A total of 6000 lawsuits had been filed by the time this Court heard oral argument on this motion.⁶ Most of the lawsuits for which Keene seeks

⁵ An undated "Notice of Claims" was submitted to the agencies on or about September 25, 1978. This initial notice was superseded by an "Amended Notice of Claim" ("Amended Notice"), which was filed prior to final administrative disposition of the initial notice.

⁶ As of November 1, 1980, 5,959 cases had been filed against Keene of which approximately 700 had been terminated by settlement, verdict, non-suit, or dismissal. Approximately forty-five new cases are filed against Keene each week. Affidavit of Howard Mileaf ¶ 5.

indemnification or contribution, therefore, are not encompassed by the Amended Notice. Consequently, Keene's claims resulting from those lawsuits clearly cannot be considered under the FTCA. See *Szyka v. United States Secretary of Defense*, 525 F.2d 62, 65 (2d Cir. 1975); *Altman v. Connally*, 456 F.2d 1114, 1116 (2d Cir. 1972).

With respect to the 1000 lawsuits for which purported administrative claims have been filed, the Government contends that the Amended Notice is defective because it fails to state a sum certain, see 28 C.F.R. § 14.2 (1980), and because it does not provide sufficient information to allow an investigation, see 28 C.F.R. § 14.4 (1980),⁷ as required by the regulations promulgated pursuant to 28 U.S.C. § 2672.⁸ There is a conflict among the circuit courts, however, over whether the administrative filing requirements of 28 U.S.C. § 2675 should be read in light of these regulations. The Fifth Circuit has ruled that these regulations do not apply to section 2675 because they bear

⁷ The Government also contends that the Amended Notice is defective because it was not accompanied by evidence of the purported representative's authority to present a claim on behalf of Keene as required by 28 C.F.R. § 14.3(e). This request, however, appears to have been satisfied by a letter from Keene's chief executive, Glenn W. Bailey, to the Department of Justice that specifically authorizes Keene's lawyers to present claims on Keene's behalf.

⁸ 28 U.S.C. § 2672 provides, in pertinent part, that

[t]he head of each Federal agency or his designee, in accordance with regulations prescribed by the Attorney General, may consider, ascertain, adjust, determine, compromise, and settle any claim for money damages against the United States for injury or loss of property or personal injury or death caused by the negligent or wrongful act or omission of any employee of the agency while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred: *Provided*, That any award, compromise, or settlement in excess of \$25,000 shall be effected only with the prior written approval of the Attorney General or his designee.

solely on the procedures to be followed for the settlement of claims and not on the manner in which a claimant must present his or her claim. See *Adams v. United States*, *supra*, 615 F.2d at 288-293. In contrast, other circuits have applied the Justice Department regulations to determine whether a claimant has satisfied section 2675. See, e.g., *House v. Mine Safety Appliances Co.*, *supra*, 573 F.2d 615-16; *Lunsford v. United States*, 570 F.2d 221, 225 (8th Cir. 1977); *Pennsylvania v. National Association of Flood Insurers*, 520 F.2d 11, 19-20 (3d Cir. 1975). Although there does not appear to be any Second Circuit decision directly on point, district judges in this circuit have applied these regulations to section 2675. See, e.g., *Luria v. C.A.B.*, 473 F. Supp. 242, 244 (S.D.N.Y. 1979) (Lasker, J.); *Kantor v. Kahn*, 463 F. Supp. 1160 (S.D.N.Y. 1979) (Sand, J.).

Despite this conflict over the relationship between sections 2672 and 2675, it is well established that a claimant must place a specific dollar amount on his damages. *Adams v. United States*, *supra*, 615 F.2d at 291 n.15.⁹ It is clear that Keene has failed to satisfy this requirement. The Amended Notice does not seek a definite sum of money. Rather, Keene seeks \$1,088,135 plus "an additional amount yet to be ascertained."¹⁰ Claims for indeterminate damages simply do not satisfy the sum certain requirement. See, e.g., *Caton v. United States*, 495 F.2d 635 (9th Cir. 1974); *Bialowas v. United States*, 443 F.2d 1047 (3d Cir. 1971); *Raymond v. United States*, 445 F. Supp. 740 (E.D. Mich. 1978); *Wright v. United States*, 427 F. Supp. 726, 727 n.2 (D. Del. 1977).

Keene responds that the Court may disregard the reservation as to future claims. See *Fallon v. United States*, 405 F. Supp.

⁹ In *Adams*, the Fifth Circuit construed section 2675 as requiring the notice of claim to include a specific amount of claimed damages. Other circuits have reached the same result through the "sum certain" requirement of 28 C.F.R. § 14.2 (1980). See, e.g., *Caton v. United States*, 495 F.2d 635, 637 (9th Cir. 1974).

¹⁰ Amended Notice of Claim at 13. Similarly, in its Amended Complaint, Keene seeks "an amount presently unknown but which is believed to be in excess of \$20 million." Amended Complaint at 36.

1320, 1322 (D. Mont. 1976). But see *Mudlo v. United States*, 423 F. Supp. 1373 (W.D. Pa. 1976). Even if the Court were to do so, however, the Amended Notice would still be deficient because it fails to particularize the damages requested for each individual lawsuit insofar as Keene seeks "costs, expenses, insurance premiums, attorneys' fees [and] the cost of executive time."¹¹

There is another reason why the Amended Notice is insufficient. After Keene submitted the Amended Notice, the Justice Department, on its behalf and on behalf of the other agencies to which the Amended Notice had been sent, requested a more detailed statement from Keene pursuant to 28 C.F.R. § 14.4 (1980). Specifically, the Justice Department requested a list of the amount of damages sought on each claim together with an itemization of various additional items of recovery sought by Keene in relation to each particular lawsuit. It also requested information regarding any insurance benefits that Keene might have recovered on these claims. Keene has not provided this information to the Government.

Once again, although there is a dispute over whether the regulations enacted pursuant to section 2672 apply to section 2675, compare *Adams v. United States*, *supra*, with *Swift v. United States*, 614 F.2d 312 (1st Cir. 1980), the Government, at a minimum, is entitled to sufficient information to enable it to evaluate the claim and choose between settlement and litigation. *Adams v. United States*, *supra*, 615 F.2d at 289. Claimants who fail to respond to an agency's request for this information

¹¹ In this regard, the Court agrees with the Government's analogy to administrative tort claims made on behalf of a class of claimants. Although Keene has technically put forth only one claim, that claim is the aggregate of the one thousand separate claims that Keene could have filed for each individual lawsuit filed against Keene. In this respect, it is like a class action.

When an aggregate claim is made on behalf of a class of claimants, the notice must state a specific amount for each claim. See, e.g., *House v. Mine Safety Appliances Co.*, *supra*, 573 F.2d at 615; *Luria v. C.A.B.*, *supra*, 473 F. Supp. at 245; *Kantor v. Kahn*, *supra*, 463 F. Supp. at 1164. Similarly, Keene must state the specific amount it seeks for each individual asbestosis lawsuit. Keene has failed to do this.

are treated as having not exhausted their administrative remedies and, consequently, cannot present their claims to a district court. See *Swift v. United States*, *supra*, 614 F.2d at 814; *Emch v. United States*, 474 F. Supp. 99, 103 (E.D. Wis. 1979), *aff'd*, 630 F.2d 523 (7th Cir. 1980), *cert. denied*, 101 S. Ct. 1482 (1981); *Founding Church of Scientology v. FBI*, 459 F. Supp. 748 (D.D.C. 1978). Keene's response that the Government is generally familiar with asbestosis litigation is insufficient. Although the Government may be on notice of the various theories on which Keene seeks contribution and indemnification, the Government is nevertheless entitled to specific information regarding each claim. See *Founding Church of Scientology*, *supra*, 459 F. Supp. at 758. The Government clearly cannot be expected to settle the claims on an all or nothing basis. Moreover, the Government is not required to sift through the records of the individual lawsuits filed against Keene; the burden is on the claimant to supply the necessary information. See *Kantor v. Kahn*, *supra*, 463 F. Supp. at 1163.

Because Keene has failed to comply with the administrative filing requirements of section 2675, the Court cannot exercise subject matter jurisdiction over the claims asserted under the FTCA. We next consider Keene's claim of admiralty jurisdiction.¹²

Admiralty Jurisdiction

The Suits in Admiralty Act ("SIAA"), 46 U.S.C. § 741 *et seq.*, and the Public Vessels Act ("PVA"), 46 U.S.C. § 781 *et seq.*, constitute a waiver by the United States of its sovereign immunity against suits arising out of maritime incidents. *Blanco v. United States*, 464 F. Supp. 927, 930 (S.D.N.Y. 1979). Under the SIAA, the United States has waived sovereign immunity with respect to "cases where if such vessel were privately owned or operated,

¹² These two theories of jurisdiction are mutually inconsistent. The FTCA specifically provides that it does not apply to suits in admiralty against the United States. 28 U.S.C. § 2680(d); see *Kelly v. United States*, 531 F.2d 1144 (2d Cir. 1976).

or if such cargo were privately owned or possessed, or if a private person or property were involved, a proceeding in admiralty could be maintained." 46 U.S.C. § 742. By the PVA, sovereign immunity was further lifted with respect to "damages caused by a public vessel of the United States." 46 U.S.C. § 781. This aspect of the motion to dismiss, therefore, turns on whether Keene's claims against the United States come within this admiralty jurisdiction.

a. Tort Jurisdiction

We note at the outset that although the persons making claims against Keene were often exposed to asbestos in maritime settings, Keene's claims over against the United States result from actions and inactions taken in Washington, D.C. See note 3 *supra*. It is a very long stretch to convert these governmental decisions into admiralty torts. We shall proceed, however, on the assumption that the ultimate damage to Keene bears a remote relationship to admiralty.

The standard test for federal admiralty tort jurisdiction is (1) did the wrong occur on navigable waters, and (2) does the wrong complained of bear a significant relationship to traditional maritime activity. *Executive Jet Aviation v. City of Cleveland*, 409 U.S. 249, 254-61 (1972). The first part of the *Executive Jet* test, the situs requirement, however, must be read in light of the Extension of Admiralty Jurisdiction Act, 46 U.S.C. § 740 ("EAJA"), which extends jurisdiction to injuries that occur on land, so long as the injury was caused by a vessel or one of its appurtenances. See generally *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 209-12 (1971). The EAJA does not affect the requirement that the wrong bear a significant relationship to traditional maritime activity. See *Heim v. City of New York*, 442 F. Supp. 35, 37 (E.D.N.Y. 1977).

A difficult aspect of this case is determining where the alleged wrong occurred. Keene alleges in Paragraph 13 of the Amended Complaint that "[m]ost of the claimants were involved in installing high temperature thermal insulation around pipes and boilers on naval ships, on vessels in navigable waters, and in

power plants and other industrial and commercial plants, including refineries." (Emphasis added.) This allegation of various situs of injuries typifies the difficulty of bringing a consolidated action of this sort. The Court may not determine whether maritime jurisdiction exists as to the entire group of 6000 lawsuits, but must make its determination on a more individualized basis. *Brown v. United States*, No. 76-434, slip op. at 21 (D. Conn. July 23, 1979). Because the burden of establishing jurisdiction is on the party who asserts it, *Escude Cruz v. Ortho Pharmaceutical Corp.*, 619 F.2d 902 (1st Cir. 1980); *Lehigh Valley Industries, Inc. v. Birenbaum*, 527 F.2d 87 (2d Cir. 1975), the Court could require Keene to make a more specific showing of jurisdiction. Rather than protract these proceedings any further,¹³ however, the Court has reviewed Keene's claim of admiralty jurisdiction generally and has determined that admiralty tort jurisdiction does not lie.

At the outset, the Court can eliminate all claims for lawsuits involving workers who were exposed to asbestos while working "in power plants and other industrial and commercial plants, including refineries." Amended Complaint ¶ 13. Although the EAJA extends admiralty jurisdiction to shoreside workers, the injury must still be "caused by a vessel on navigable water." 46 U.S.C. § 740; see *Boudloche v. Conoco Oil Corp.*, 615 F.2d 687, 688 (5th Cir. 1980). The EAJA does not convert "a classic non-maritime, land-based injury into something else." *Pryor v. American President Lines*, 520 F.2d 974, 979 (4th Cir. 1975) (quoting *Kent v. Shell Oil Co.*, 286 F.2d 746, 750 (5th Cir. 1961)), cert. denied, 423 U.S. 1055 (1976). Rather, there must be a proximate cause relationship between the injury and the vessel. *Bailey v. Johns-Mansville Corp.*, No. 77-1, slip op. at 5 (E.D. Va. March 30, 1978). That the asbestos was ultimately installed on a vessel does not establish the requisite proximate cause. *Id.*

With respect to those claims for lawsuits of plaintiffs who were exposed to asbestos while working on vessels in navigable

¹³ The Government initially noticed this motion in May of 1980. The Court did not receive the final papers on this motion until June, 1981.

waters, the Court must determine whether the installation of high thermal insulation around pipes and boilers bears a significant relationship to traditional maritime activity. The Court concludes that it does not.

The factors that are frequently considered in determining whether the tort alleged bears a significant relationship to traditional maritime activity include the functions and roles of the parties, the types of vehicles and instrumentalities involved, the causation and type of injury, and the traditional concepts of the role of admiralty law. See *Edynak v. Atlantic Shipping Inc.*, 562 F.2d 215, 220-21 (3d Cir. 1977), cert. denied, 434 U.S. 1034 (1978); *Kelly v. Smith*, 485 F.2d 520, 525 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974); *Otto v. Alper*, 489 F. Supp. 953, 955 (D. Del. 1980); *Montgomery v. Harrold*, 473 F. Supp. 61 (E.D. Mich. 1979); *Kayfetz v. Walker*, 404 F. Supp. 75, 76-77 (D. Conn. 1975) (Lumbard, Cir. J.).

The function and role of the Government viz Keene was that of supplier of asbestos and purchaser of asbestos products. As the purchaser, the Government designed the specifications for the asbestos products. There is nothing in this relationship that is indigenous to maritime law. See generally *Bailey v. Johns-Mansville*, *supra*, slip op. at 5.

The "vehicles involved" include naval ships and vessels. That these workers were exposed to asbestos on ships rather than in power plants or refineries was purely fortuitous. Moreover, it does not appear that these ships ever left the dock while they were being built or repaired. See *Montgomery v. Harrold*, *supra*, 473 F. Supp. at 64.

The cause and type of injury, exposure to asbestos, is certainly not unique to admiralty. Indeed, lawsuits stemming from the exposure to asbestos have arisen from a variety of industries. In *Re Asbestos & Asbestos Insulation Material Products Liability Litigation*, *supra*, 431 F. Supp. at 907. Moreover, Keene has not referred to anything in the traditional concepts of admiralty that would militate toward admiralty jurisdiction in this case. There is simply no significant relationship between the hazards of asbestos and traditional maritime activity.

b. Contract Jurisdiction

Keene also contends that admiralty jurisdiction exists with respect to Keene's claims for breach of warranty sounding in contract. The Court rejects this claim of admiralty jurisdiction as well.

The general rule is that admiralty jurisdiction is limited to contracts that are related to a maritime service or a maritime transaction. *See generally* 1 Benedict on Admiralty §§ 182, 183 (1974 & Supp. 1980). "The mere fact that the services to be performed under a contract relate to a ship or its business, or that a ship is the object of such services, does not, in and of itself, mean they are maritime. The test to be applied in deciding whether or not a contract is maritime is its nature and subject matter." *P.D. Marchessini & Co. v. Pacific Marine Corporation*, 227 F. Supp. 17, 18 (1974) (Weinfeld, J.). The contracts between the Government and Keene involved the purchase and sale of asbestos fiber and thermal insulation products. Although some of these products might have ultimately been used in the construction or repair of vessels, that fact alone will not convert a nonmaritime contract into a maritime contract.

FECA Claims

Many asbestosis claimants were employees of the United States working in naval shipyards when they were exposed to asbestos.¹⁴ As such, their exclusive remedy against the United States is pursuant to the Federal Employees Act ("FECA"), 5 U.S.C. § 8101 *et seq.* They are not precluded, however, from instituting suit against negligent third parties.

Keene seeks contribution or indemnity for the damages it has paid or will pay in those actions brought against it by Government employees. It is not clear what Keene's jurisdictional basis is for this claim. FECA does not constitute a waiver of sovereign immunity. Keene must therefore rely on FTCA, SIAA, or PVA

¹⁴ The Amended Notice does not indicate how many claimants are or were employees of the United States Government. The Government needs this information to settle these claims.

jurisdiction, which for reasons already discussed, are not available to Keene.¹⁵ Moreover, FECA bars suits by joint tortfeasors against the United States for contribution or indemnity relating to a federal employee's injuries. *See Zapico v. Bucyrus-Erie Co.*, 579 F.2d 714 (2d Cir. 1978);¹⁶ *Galimi v. Jetco*, 514 F.2d 949 (2d Cir. 1975). *See also Austin v. Johns-Manville Sales Corporation*, 508 F. Supp. 313, 317 (D. Me. 1981); *Oman v. Johns-Manville Corp.*, 482 F. Supp. 1060, 1069-71 (E.D. Va. 1980). To the extent that Keene seeks contract based immunity, its remedy is in the Court of Claims under the Tucker Act. *See* 28 U.S.C. §§ 1346(a)(2), 1491. *Galimi v. Jetco, supra*, 514 F.2d at 951.

In Counts 19 through 23 of the Amended Complaint, Keene seeks recovery of the amount of FECA benefits that the Government has recouped from asbestosis claimants. FECA provides that whenever a federal employee obtains a judgment on, or settles a claim arising out of his death or injury, the federal employee must reimburse the Government for its FECA payments. 5 U.S.C. § 8132. The Government's lien on its employees' recoveries from third parties is typical of workers' compensation programs.

Keene contends that it is entitled to the monies recouped by the Government because the Government played a significant role in causing the injuries to the asbestosis claimants. Keene sets forth five separate theories of recovery: Count 19 is a claim for damages based on unjust enrichment. Count 20 is a claim for restitution of money had and received. Count 21 is a claim

¹⁵ Keene also alleges federal question jurisdiction. 28 U.S.C. § 1331. We summarily reject this claim of jurisdiction because it is well established that federal question jurisdiction is not a waiver of sovereign immunity. *See, e.g., Estate of Watson v. Blumenthal*, 586 F.2d 925 (2d Cir. 1978); *Doe v. United States Civil Service Commission*, 483 F. Supp. 539 (S.D.N.Y. 1980).

¹⁶ Although *Zapico* involved the "exclusive remedy" provision of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 905(a), that provision is nearly identical to that of FECA and has been construed in a similar fashion.

for consequential damages arising from the Government's intentional conduct. Count 22 alleges an unconstitutional taking of property without due process of law. Count 23 seeks to enjoin the Government from future violations of Keene's constitutional rights. Jurisdiction for Counts 19, 20, and 21 is alleged to exist under the FTCA and the SIAA. Keene alleges jurisdiction for Counts 22 and 23 under 28 U.S.C. § 1331, federal question jurisdiction.

Keene's assertion of FTCA and SIAA jurisdiction for Counts 19-21 must be rejected for the reasons discussed earlier. With respect to the claim under the FTCA, Keene has failed to satisfy the administrative filing requirements of 28 U.S.C. § 2675. Accordingly, the Court cannot exercise subject matter jurisdiction over Keene's claims under the FTCA. SIAA jurisdiction cannot be relied upon since there is no nexus between the Government's recoupment of its FECA liens and traditional maritime activities. Accordingly, the Court does not have subject matter jurisdiction over Counts 19-21.

Keene's assertion of federal question jurisdiction for its constitutional claims must likewise be rejected. Keene relies primarily on the landmark case of *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), in which the Supreme Court first implied a private cause of action for damages arising out of a violation of constitutional rights by government officials. *Bivens*, however, does not stand for the proposition that the United States may be sued for constitutional violations. *Norton v. United States*, 581 F.2d 390, 393 (4th Cir.), *cert. denied*, 439 U.S. 1003 (1978). It authorizes actions only against the responsible federal official. *Butz v. Economou*, 438 U.S. 478, 504 (1978). *Bivens* type actions brought against the United States, therefore, are routinely dismissed for lack of subject matter jurisdiction. *See, e.g., Contemporary Mission, Inc. v. United States Postal Service*, 648 F.2d 97, 104 (2d Cir. 1981); *Leonhard v. United States*, 633 F.2d 599, 618 n.27 (2d Cir. 1980), *cert. denied*, 49 U.S.L.W. 3864 (U.S. May 18, 1981) (No. 80-1651). To the extent that the Court would have jurisdiction to hear Keene's constitutional claims, jurisdiction would lie under the Tucker Act, 28 U.S.C. 1346(a). Since Keene's claims

exceed \$10,000, jurisdiction lies exclusively in the Court of Claims. *See Estate of Watson v. Blumenthal*, 586 F.2d 925, 928 (2d Cir. 1978); 1 Moore's Federal Practice ¶ 0.65[2.-3] (2d ed. 1980).

Conclusion

It is clear that something must be done to decongest the courts from the glut of asbestos related lawsuits.¹⁷ Although the Court understands Keene's efforts to make the unmanageable more manageable, this action must be dismissed because Keene has attempted to do too much at one time, with too little jurisdiction. The doctrine of sovereign immunity, although commonly considered to be "dying," remains powerful and permits the United States to dictate the manner in which it may or may not be sued. *United States v. Mitchell*, 100 S. Ct. 1349, 1352 (1980). Because Keene has failed to satisfy the requirements for bringing suit against the United States, this action must be dismissed for want of subject matter jurisdiction.¹⁸ Accordingly, the Government's motion to dismiss is granted.

SO ORDERED.

Dated: New York, N.Y.
September 30, 1981

/s/ Gerard L. Goettel
GERARD L. GOETTEL
U.S.D.J.

¹⁷ It may be that the only practicable solution is a legislative one. *Cf. Black Lung Benefits Act*, 30 U.S.C. § 901 *et seq.*

¹⁸ In addition, to the extent that Keene seeks indemnity for actions that have not been terminated, the Court lacks subject matter jurisdiction because there is no case or controversy. *See generally Forty-Eight Insulations, Inc. v. Johns-Manville Product Corp.*, 472 F. Supp. 385 (N.D. Ill. 1979).

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,
v. *Petitioner,*
UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF FOR PETITIONER

RICHARD G. TARANTO
Counsel of Record

JOEL I. KLEIN
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

JOHN H. KAZANJIAN
IRENE C. WARSHAUER
MARY BETH GORRIE
ANDERSON KILL OLICK &
OSHINSKY, P.C.
666 Third Avenue
New York, NY 10017

STUART E. RICKERSON
Vice President-General Counsel
JOHN G. O'BRIEN
Associate General Counsel
KEENE CORPORATION
200 Park Avenue
New York, NY 10166

QUESTIONS PRESENTED

1. Whether 28 U.S.C. § 1500 treats a claim in a non-Claims Court suit as "for or in respect to" a claim in the Claims Court when Congress has precluded the plaintiff from bringing both claims in the same court.

2. Whether 28 U.S.C. § 1500 prohibits adjudication of a case in the Claims Court when the plaintiff's related non-Claims Court action is no longer pending.

3. Whether the Federal Circuit's interpretation of 28 U.S.C. § 1500, if adopted by this Court, should be held not to bar petitioner's claims, under the doctrines of non-retroactivity or equitable tolling.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

—
 No. 92-166
 —

KEENE CORPORATION,
 v. *Petitioner,*

UNITED STATES OF AMERICA,
Respondent.

—
**On Petition for a Writ of Certiorari to the
 United States Court of Appeals
 for the Federal Circuit**

—
BRIEF FOR PETITIONER
 —

OPINIONS BELOW

The *en banc* opinion of the court of appeals (Pet. App. A1-A34) is reported at 962 F.2d 1013. The panel opinion of the court of appeals (Pet. App. D1-D30) is reported at 911 F.2d 654. The opinion of the Claims Court (Pet. App. E1-E27) is reported at 17 Cl. Ct. 146.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1992. This Court has jurisdiction under 28 U.S.C. § 1254. The petition for a writ of certiorari was filed on July 22, 1992, and granted on October 19, 1992.

STATUTE INVOLVED

Section 1500 of Title 28, U.S. Code—as amended on October 29, 1992, to change the name of the Claims Court to the “Court of Federal Claims” (Court of Federal

Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, § 902)—currently provides:

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

Prior to October 29, 1992, the provision was identical except that it referred to the "United States Claims Court." 28 U.S.C. § 1500 (1988). Prior to April 2, 1982—the effective date of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25—the only difference was that Section 1500 referred to the "Court of Claims." 28 U.S.C. § 1500 (1976). Section 1500 was enacted as part of the 1948 Judicial Code. Act of June 25, 1948, ch. 646, 62 Stat. 942.

STATEMENT

The Federal Circuit in this case held that 28 U.S.C. § 1500 required dismissal of petitioner Keene's contractual and constitutional monetary claims against the United States in the Claims Court—claims that sought to hold the United States responsible for its share of the massive asbestos-litigation burdens incurred by Keene. Overruling numerous prior decisions, the Federal Circuit concluded that Section 1500 requires dismissal whenever the plaintiff had pending elsewhere, at the time the Claims Court action was filed, a suit on claims growing out of the same operative facts—even if the other suit is no longer pending when a motion for dismissal is entertained and even if the law prohibited the plaintiff from bringing both claims in the same court. Keene seeks reversal of that ruling.

1. Background

Petitioner Keene Corporation was formed in 1967.¹ One year later, it acquired, for \$8 million, most of the stock of Baldwin-Ehret-Hill, Inc. (BEH), which had been formed in 1959, when Ehret Magnesia Manufacturing Company (Ehret) merged with Baldwin-Hill Company (B-H). In 1970, BEH was merged into, and its business transferred to, another Keene subsidiary, Keene Building Products Corporation (KBPC). KBPC, BEH, and BEH's predecessors manufactured and sold thermal insulation products and acoustical products, some of which contained asbestos. *See* Pet. App. H2.

In the mid-1970s, plaintiffs began bringing personal injury suits against Keene and other manufacturers and sellers of asbestos or products containing asbestos. The suits claim injury resulting from exposure to asbestos, exposure that usually occurred decades earlier. Many of the cases involved exposure at shipyards run by the United States during World War II or from products made with asbestos fibers purchased from the United States or manufactured pursuant to government specifications.

The pace of asbestos-based filings has increased dramatically since the 1970s. Keene itself has been named a defendant in more than 156,000 cases. It has settled or tried almost 78,000 cases. Approximately 87,000 lawsuits are pending. New cases are being filed at an even greater rate: the rate of filings in 1992 is roughly 50 percent higher than in 1991; indeed, new filings outpace settlements and other dispositions of pending cases by a ratio of almost two to one. *See generally* Keene Corp. 1991 Annual Report.

To date, Keene has spent nearly \$400 million in its litigation. Other former manufacturers and distributors of products containing asbestos have faced similar finan-

¹ For petitioner's statements pursuant to Rules 14.1(b) and 29.1 of the Rules of this Court, *see* Pet. 1 n.1.

cial burdens: at least 16 such companies have already collapsed under their weight, declaring bankruptcy or dissolving. See Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 Cardozo L. Rev. 1819, 1819 n.2 (1992). In July 1990, Keene proposed to resolve all meritorious personal injury claims against it through a compensation program making available 80 percent of its net worth, or approximately \$190 million. See Keene Corp. 1991 Annual Report. By contrast, the United States has made no move to assume, and has steadfastly resisted all efforts to impose on it, any responsibility for asbestos injuries, despite its clear and knowing role in creating the problem. See Pet. App. H6-H15 (detailing Government knowledge and responsibility).²

2. Keene's Tucker Act Suits in the Court of Claims

a. *Keene I.* In December 1979, Keene brought a petition against the Government in the United States Court of Claims. *Keene Corp. v. United States*, No. 579-79C (Ct. Cl. 1979) (*Keene I.*).³ The petition sought recovery under the Tucker Act, 28 U.S.C. § 1491(a)(1), based on express and implied contracts between the United States and Keene's former subsidiary (KBPC) and its prede-

² See *In re Eastern & S. Dist. Asbestos Litig.*, 772 F. Supp. 1380, 1384 (E. & S.D.N.Y. 1991) ("The Navy, though aware of the hazards posed by asbestos dust, in its urge to build its warships as quickly as possible, did not inform workers [at its shipyards] of the dangers and neglected to take available protective precautions."); Brickman, *supra*, at 1885-86.

³ Cases in the Court of Claims were initiated by the filing of a "petition." The Court of Claims was abolished in 1982 and its trial jurisdiction transferred to the newly created Claims Court, where cases are initiated by the filing of a complaint. In October 1992, Congress changed the name of the Claims Court to the "Court of Federal Claims." Following the Federal Circuit's usage, we generally refer to the "Claims Court" in this brief, unless the focus on years prior to 1982 makes reference to the "Court of Claims" appropriate.

cessors (BEH, Ehret, and B-H). Pet. App. H1-H2.⁴ Alleging that the Government knew of asbestos hazards as far back as the 1930s (Pet. App. H6-H14), Keene's petition sought to recover from the Government some or all of the liability and costs incurred by Keene in thousands of cases. It rested this claim on (1) the Government's sale to Keene of asbestos fibers and (2) the Government's purchase from Keene of various insulation products containing asbestos. Based on the Government's control and inspection of workplaces, its superior knowledge of relevant hazards, and its specifications requiring the use of asbestos in certain products, the petition alleged that those contracts contained warranties (1) that the fibers sold to Keene were safe for their intended use at government facilities and (2) that Keene's costs in selling insulation to the Government would be limited by the Government's provision of adequate warnings to and protections for the intended users of the insulation. Pet. App. H15-H19.

In August 1980, the Government moved for summary judgment on several grounds, among them that Section 1500 deprived the Court of Claims of jurisdiction because Keene, after filing *Keene I.*, had filed an action against the Government in the Southern District of New York under the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2671 *et seq.*, and other statutes. Motion for Summary Judgment at 26-27 (Aug. 1980).⁵ In its reply brief, however, the Government abandoned the Section 1500 argument for "tactical reasons." *Keene Corp. v. United States*, 12 Cl. Ct. 197, 199 (1987) (quoting declaration of government attorney), *aff'd sub nom. Johns-Manville*

⁴ We hereafter refer to "Keene" even when the statements refer more particularly to Keene's former subsidiary and its predecessors, whether before or after they became part of Keene.

⁵ The New York case, filed *after Keene I.*, is described below. See pages 7-8, *infra*.

The Government's motion did not mention or rely on the *Miller* third-party action filed by Keene *before* it brought suit in the Court of Claims. See pages 6-7, *infra*.

Corp. v. United States, 855 F.2d 1556 (Fed. Cir. 1988), cert. denied, 489 U.S. 1066 (1989). Accordingly, when the Court of Claims denied the motion for summary judgment on May 1, 1981, it did not mention the Section 1500 issue. See J.A. 4-5; *Keene*, 12 Cl. Ct. at 200 (Claims Court later explained that the Section 1500 argument had not been ruled on because it was abandoned by the Government).

b. *Keene II*. On September 25, 1981, Keene filed a second petition in the Court of Claims seeking recovery from the United States under the Tucker Act. *Keene Corp. v. United States*, No. 585-81C (Ct. Cl. 1981) (*Keene II*). See Pet. App. F. This petition was founded not on contract rights but "upon the Constitution." 28 U.S.C. § 1491(a)(1). The Government had paid compensation for asbestos injuries to its employees (or former employees) under the Federal Employees' Compensation Act, 5 U.S.C. § 8101 *et seq.*, taking the position that its liability was limited to such amounts. It then recouped those payments, under 5 U.S.C. § 8132, from any employees who had received payments from Keene. Pet. App. F9-F10. Keene sought recovery of the recouped amounts on the ground that, because the Government was in fact responsible for the injuries, the recoupment constituted a taking of Keene's property and deprivation without due process of law. Pet. App. F10-F11.

Discovery proceeded for several years in both *Keene I* and *Keene II*. In November 1984, the two cases were consolidated for further discovery with each other and with several other Claims Court actions against the United States brought by various manufacturers of asbestos-containing products: GAF Corporation, H.K. Porter Co., Fibreboard Corporation, Raymark Industries, Inc., UNR Industries, Inc., Eagle-Picher Industries, Inc., and Johns-Manville Corp. Pre-trial discovery and other preparations continued for several more years.

3. *Keene's non-Tucker Act Suits*

a. *The Third-Party Action in Miller*. In June 1979—several months before the filing of *Keene I* in the Court

of Claims—Keene impleaded the United States by filing a third-party complaint in one individual's personal injury suit in the district court in the Western District of Pennsylvania. *Miller v. Johns-Manville Prods. Corp.*, No. 78-1283E (W.D. Pa. Oct. 31, 1979) (*Miller*). See Pet. App. I. Keene sought contribution and/or indemnity from the United States, alleging that, if it was liable to Miller, the Government was jointly and severally liable because Miller's alleged exposure to asbestos products was to products supplied by the Government or to the Government under Government specifications or contracts requiring use of asbestos. *Id.* at I2-I3. Keene brought these claims solely under the FTCA, 28 U.S.C. §§ 1346(b), 2674. See Pet. App. I2 (paragraphs 3, 4, relying exclusively on FTCA); *Lockheed Aircraft Corp. v. United States*, 460 U.S. 190, 198 (1983) (citing earlier cases).

In April 1980—after *Keene I* had been filed—Keene moved under Fed. R. Civ. P. 41 for voluntary dismissal, without prejudice, of its third-party complaint against the United States in *Miller*. Pet. App. G. The motion referred to *Keene I* and stated that the decision in that case "should resolve the differences between the parties." Pet. App. G2. The third-party complaint was dismissed in May 1980. See Pet. App. E15.

b. *The Action in New York*. In January 1980—two weeks after *Keene I* was filed in the Court of Claims—Keene brought suit against the United States in the Southern District of New York. *Keene Corp. v. United States*, No. 80-Civ.-0401GLG (Jan. 2, 1980); J.A. 6-40 (amended complaint). The complaint, generally an action for contribution or indemnity, sought recovery from the United States for some or all of the liability and costs incurred by Keene in the thousands of suits where claimants' asbestos exposure involved the Government. The complaint stated no claims under the Tucker Act. Most counts of the complaint asserted liability under the FTCA, stating various theories including breach of implied warranties, strict liability, failure to warn of risks, failure to design a safe product, and other negligence. Other

counts asserted claims and jurisdiction under the Federal Employees' Compensation Act; under admiralty law, the Suits in Admiralty Act, and the Extension of Admiralty Jurisdiction Act, 28 U.S.C. § 1333 and 46 U.S.C. §§ 740-52; under the Public Vessels Act, 46 U.S.C. §§ 781-90; and under 28 U.S.C. § 1331 and the common law. See J.A. 6-40.

On September 30, 1981—after *Keene II* had been filed in the Court of Claims—the district court granted the Government's motion to dismiss the action for lack of subject matter jurisdiction. J.A. 41-57. The court held that the FTCA claims were jurisdictionally barred because Keene's omnibus administrative notice covering thousands of existing and future claims did not satisfy the requirement of the FTCA, 28 U.S.C. § 2675: in particular, they did not state a "sum certain" giving specific information about each underlying claim. J.A. 43-50. The court also held that Keene's claims all fell outside the other heads of jurisdiction asserted, including admiralty jurisdiction (J.A. 50-54; *id.* at 54-56). The court noted that, to the extent that Keene had constitutional claims, those belonged in the Court of Claims. J.A. 56-57. On February 10, 1983, the Second Circuit affirmed the dismissal for want of jurisdiction, essentially for the reasons given by the district court. *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

c. *The Action in the District of Columbia.* On July 28, 1982, while the New York case was on appeal to the Second Circuit, Keene, having sought to cure the defects in its administrative filings, brought a second omnibus action against the United States, this time in the district court for the District of Columbia. *Keene Corp. v. United States*, No. 82-2120 (D.D.C.). In August 1983, the Government moved to dismiss for lack of jurisdiction, relying on the Second Circuit decision. The district court granted the motion on July 31, 1984, holding that the jurisdictional rulings in the New York action had preclusive effect in this action and equally required dismissal.

In particular, the court held that Keene's new administrative notice under the FTCA was inadequate because it failed to state specific amounts for each asbestos claimant. *Keene Corp. v. United States*, 591 F. Supp. 1340, 1348-49 (D.D.C. 1984). That decision was affirmed by the D.C. Circuit on May 5, 1987. *GAF Corp. v. United States*, 818 F.2d 901, 912-16 (D.C. Cir. 1987).

4. *The Claims Court and Federal Circuit Rulings on the Meaning of "Claim"*

Pre-trial preparations proceeded in the Claims Court in *Keene I* (filed in 1979) and *Keene II* (filed in 1981), along with the consolidated cases, until 1987. (In none of Keene's three actions in district court—one voluntarily dismissed, two dismissed on jurisdictional grounds—had there been comparable pre-trial discovery and proceedings against the United States on the merits.) In March 1987, shortly before trial was set to begin in one of the Johns-Manville cases, the Government moved to dismiss *Keene I* and *Keene II* (and the consolidated cases) under 28 U.S.C. § 1500. The Government did not, however, raise the issue on its own. Rather, the motion resulted from the Claims Court's *sua sponte* order directing the Government "to state its position on the applicability of 28 U.S.C. § 1500." *Keene Corp.*, 12 Cl. Ct. at 199.

The Claims Court declined to rule on the motion with respect to Keene's suits and limited its ruling to Johns-Manville's actions. *Keene Corp.*, 12 Cl. Ct. at 198 n.1 (April 6, 1987). The court held that those actions were barred by Section 1500 based on still-pending actions that, while filed under the FTCA rather than the Tucker Act, alleged similar facts and sought similar relief. 12 Cl. Ct. at 199-216; see *Johns-Manville*, 855 F.2d at 1558. The court did not, however, dismiss the cases outright. Instead, following *Brown v. United States*, 358 F.2d 1002, 175 Ct. Cl. 343 (1966), the court ordered dismissal unless Johns-Manville proceeded to dismiss the still-pending actions in the other courts. 12 Cl. Ct. at 212, 216.

On appeal from that ruling, the Federal Circuit, over a dissent, affirmed. *Johns-Manville*, 855 F.2d 1556. The court held that the term "claim" in Section 1500 is defined by "the operative facts alleged, not the legal theories raised," at least for a given type of relief sought (monetary versus equitable). *Id.* at 1563, 1567. The claims in two cases—one in the Claims Court, another in a different court—were the same under Section 1500, therefore, if they both sought monetary relief arising from the same operative facts. And that was so, the court held, even if Congress's division of jurisdiction (*e.g.*, assigning FTCA claims to the district courts and Tucker Act claims for more than \$10,000 to the Claims Court) prohibited the plaintiff from bringing the two claims in the same court. *Id.* at 1564-67. The Federal Circuit, like the Claims Court, engaged in a detailed analysis of the operative facts in *Johns-Manville*'s claims in its various actions and found them the same as those of the Claims Court action. *Id.* at 1563-64. The Federal Circuit did not disturb the Claims Court's ruling that dismissal would not be required under Section 1500 if *Johns-Manville* went ahead and dismissed the related non-Claims Court actions.

5. The Claims Court's Dismissal of *Keene I* and *II*

In November 1988, after the Federal Circuit's decision in *Johns-Manville*, the Government filed a motion for summary judgment in *Keene I* and *Keene II* (and the other companies' cases) on Section 1500 grounds. Although none of Keene's three other actions against the United States was any longer pending, the Claims Court granted the motion and dismissed both of Keene's cases because, at the time they were filed (7 and 9 years previously), Keene had other suits on the same "claim" pending in other courts. Pet. App. E5, E18-E27.⁶ The court first

⁶ The Claims Court mistakenly believed that the Federal Circuit in *Johns-Manville* had already ruled that the dispositive statutory question was whether the non-Claims Court action was pending at the time the Claims Court action was filed. In fact, that issue was not presented in *Johns-Manville*, because the non-Claims Court ac-

concluded that Keene's various actions all sought the same relief based on the same operative facts and therefore involved the same "claim" for purposes of Section 1500. *Id.* at E19-E21. It then held that *Keene I* was barred because it was filed while *Miller* was still pending (on December 21, 1979) and the voluntary dismissal of *Miller* a few months later (in May 1980) did not lift the bar. *Id.* at E24-E25. See also *id.* at E26 n.8 (noting that Keene's 1981 New York action, filed after *Keene I*, might bar that suit as well). The Claims Court did not separately discuss *Keene II*—filed shortly after Keene brought its omnibus New York action—but dismissed it as well. Pet. App. E27.

6. The Federal Circuit's Decisions

a. *The Panel Decision.* In 1990, a divided panel of the Federal Circuit reversed the Claims Court decision as to Keene. Pet. App. D1-D30. The court concluded first that neither Section 1500's text nor the legislative history of its progenitor (an 1868 Act) provided a plain answer to the question of *when* the non-Claims Court action has to be "pending" to raise Section 1500's bar to the Claims Court case. Pet. App. D8-D16. Looking then to the nature and policy of Section 1500 as reflected in extensive precedent, the court held that a Claims Court action should not be dismissed under Section 1500 if no other suit is pending at the time the court entertains and acts on the motion to dismiss. *Id.* at D16-D24.

The court observed that the function of Section 1500 was not to define the Claims Court's subject matter jurisdiction (unlike 28 U.S.C. § 1331 or 1332 or 1491): after all, the Tucker Act clearly provides jurisdiction over these cases. Instead, the provision serves merely as a bar to forcing the Government "to defend the same suit in two different courts at the same time." Pet. App. D18. Since the provision is therefore aimed only at the sequencing of suits—while the rules of preclusion

tions there were still pending when the Claims Court addressed the Section 1500 issue.

protect the Government against truly duplicative litigation (*id.* at D13)—the panel concluded that the Section 1500 “has pending” inquiry does not appropriately focus on the time the Claims Court action was filed. Rather, once the non-Claims Court actions are no longer pending, there is no basis for the court to invoke Section 1500 and dismiss the action. *Id.* at D16-D24. Because Keene’s actions in courts other than the Claims Court had long since been dismissed, the panel held, *Keene I* and *Keene II* should not have been dismissed. *Id.* at D25.

Judge Mayer dissented. Pet. App. D26-D30. In his view, because Section 1500 speaks of “jurisdiction,” its plain meaning required dismissal if another suit was pending at the time of the filing in the Claims Court. *Id.* at D26-D28. He acknowledged that his view was arguably inconsistent with *Brown v. United States*, *supra*, and urged the overruling of *Brown*. Pet. App. D28-D29. He also urged the overruling of *Tecon Eng’rs, Inc. v. United States*, 343 F.2d 943, 170 Ct. Cl. 389 (1965), *cert. denied*, 382 U.S. 976 (1966). Pet. App. D30.

b. *The En Banc Decision.* Upon rehearing *en banc*, the Federal Circuit, in an opinion by Judge Mayer, disagreed with the result reached by the panel and affirmed the Claims Court’s dismissal of the actions under Section 1500. Pet. App. A1-A24. Undertaking a general reconsideration of Section 1500, the court concluded that the statute was designed not only “to prevent simultaneous dual litigation against the government” but also “to force an election of forum” even when a single forum was statutorily barred from entertaining all of the plaintiff’s causes of action. Pet. App. A14. Based on that view of the statute’s purpose, and what it viewed as the statute’s “plain language,” the court held that a Claims Court suit must be dismissed if, as with Keene’s suits, another action on the same claim was pending at the time the Claims Court suit was filed, regardless of whether the other action had since been dismissed. *Id.* at A15-A17. The court explained that “[i]t is fundamental that jurisdiction is established, if at all, at the time suit is filed”

and that “[a]ll jurisdictional rules are absolute.” *Id.* at A17. The court recognized that to reach its result it had to, and it accordingly did, overrule *Brown v. United States*, *supra*, which held that dismissal was improper once the related actions against the Government, though pending when the Court of Claims suit was filed, were “no longer pending.” 358 F.2d at 1004. Pet. App. A17.

The court also overruled three other established precedents—*Casman v. United States*, 135 Ct. Cl. 647 (1956); *Hossein v. United States*, 218 Ct. Cl. 727 (1978); *Boston Five Cents Sav. Bank, FSB v. United States*, 864 F.2d 137 (Fed. Cir. 1988). Pet. App. A17 n.3, A22. All of those decisions relied on and applied the principle that Section 1500 does not apply—the “claims” are not the same—where the claims filed in the Claims Court and those pending in another court could not, under federal jurisdictional statutes, be brought in the same forum. The Federal Circuit overruled those decisions as inconsistent with its view that Section 1500 must be read rigidly and absolutely, unaffected by considerations of equity, as barring “all claims on whatever theories that ‘arise from the same operative facts.’” Pet. App. A20.

Finally, the Federal Circuit overruled *Tecon Engineers* and held that, even if jurisdiction was proper at the time of filing in the Claims Court, jurisdiction is lost if another sufficiently similar action is thereafter filed in another court. Pet. App. A15, A18-A19. The court reached this result even though it had held, in overruling *Brown*, that Section 1500 must apply at the moment of filing in the Claims Court because it stated a true “jurisdictional” rule. The court acknowledged that “it is axiomatic that once jurisdiction attaches, subsequent activities by the parties do not affect it.” Pet. App. A18. But, the court said, “the result here occurs by operation of law.” *Ibid.*⁷

⁷ The court further held that its ruling must be retroactive, even though it recognized the hardship that its rewriting of the law would cause.

Chief Judge Nies concurred but wrote separately to suggest that, in light of the court's newly stringent interpretation of Section 1500, the precedent declaring equitable tolling of statutes of limitations not to be available (*Ball v. United States*, 137 F. Supp. 740, 133 Ct. Cl. 841, *cert. denied*, 352 U.S. 827 (1956)) should be reconsidered where jurisdictional limits prevented the plaintiff from bringing all of its claims in the same forum. Pet. App. A24. Chief Judge Nies observed that this Court's decision in *Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990), holding equitable tolling to be available against the Government, supported such a reconsideration. *Ibid.* Judge Plager dissented from the majority's ruling, restating many of the reasons set forth in the panel opinion. Pet. App. A25-A34.

SUMMARY OF THE ARGUMENT

The Federal Circuit construed Section 1500 as establishing a rigid jurisdictional restriction whose function is to deprive persons injured by the United States of rights Congress has made available to them. That construction, which hardly follows from the terms of the statute, marks a radical departure from decades of settled precedent and is fundamentally out of keeping with present congressional policy against any such forfeitures of legal rights. This Court should restore the provision to its properly limited role as a sensible tool for coordinating multiple litigation against the Government.

The Federal Circuit first adopted an erroneous standard for deciding when a "claim" in one case is "for or in respect to" a "claim" in another. Section 1500 is naturally read, with reference to the law of claim preclusion, to treat claims as the same under that standard only if bringing them separately against the Government would be improper claim-splitting. Where, as in this case, Congress has affirmatively forbidden the joinder of claims—by insisting that they be brought in different courts—they cannot be deemed the same for purposes of

Section 1500. This was the well-established law overruled by the Federal Circuit here. *See, e.g., Allied Materials & Equip. Co. v. United States*, 210 Ct. Cl. 714 (1976); *Casman v. United States*, 135 Ct. Cl. 647 (1956).

The court of appeals' reading would lead directly and predictably to unjustified delays in adjudication and unauthorized sacrifice of rights against the Government: multiple suits are a well-recognized reality under the complex legal and jurisdictional schemes that govern claims against the Government. Yet Congress has not provided for forced elections among rights in cases like this (*see Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980)); to the contrary, loss of rights by unavoidable jurisdictional "errors" is plainly offensive to current statutory policy (28 U.S.C. § 1631; *Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990)). The Federal Circuit's approach violates these clear policies and, in addition, is needlessly hard to apply. The court's approach, moreover, cannot fairly be derived from the legislative history behind the 1868 precursor to Section 1500. In fact, preclusion law, together with the traditional power to stay proceedings where appropriate, fully serves the statutory policy of protecting the Government against truly duplicative litigation.

The Federal Circuit also adopted an erroneous rule that jurisdiction to adjudicate a case is lacking whenever the related non-Claims Court case was pending on the day the Claims Court case was filed. This holding, based on the court's view of the term "jurisdiction" in Section 1500, derives simply from a borrowing and rigid application of the time-of-filing rule for determining diversity jurisdiction. That analogy, however, is not required or appropriate in the present setting.

The court of appeals and the Government themselves reject the analogy when they assert that post-filing events can and do defeat jurisdiction—*i.e.*, that even if Claims Court jurisdiction is initially present, it is lost by a sub-

sequent filing in another case. Moreover, even in the diversity context, the time-of-filing rule is not rigid, but is applied with an eye to practicalities, so as to allow "retroactive cures" of jurisdictional defects by post-filing events. See *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989). The statutory language of Section 1500—in the context of surrounding provisions' references to jurisdiction "to render judgment"—*a fortiori* allows for such an approach. Flexibility is particularly warranted because, at most, the provision merely places a timing limit on the exercise of subject matter jurisdiction that has plainly been granted to the court. See, e.g., *Irwin v. Veterans Admin., supra*; *Mathews v. Eldridge*, 424 U.S. 319 (1976).

Properly read, then, Section 1500 permits adjudication of a case once the related non-Claims Court action is no longer pending. This was the well-established law overruled by the Federal Circuit here. See, e.g., *Hossein v. United States*, 218 Ct. Cl. 727 (1978); *Brown v. United States*, 358 F.2d 1002, 175 Ct. Cl. 343 (1966). The policy of Section 1500 is fully satisfied by the availability of preclusion principles and the authority to stay proceedings where necessary to prevent duplicative litigation.

Finally, even if this Court adopts the Federal Circuit's reading of Section 1500, Keene should not be prevented from pursuing its claims. Given the Federal Circuit's wholesale overruling of clear law, on which Keene justifiably relied, the doctrine of *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), calls for non-retroactive application of the new reading of Section 1500. And in any event, equitable tolling of the statute of limitations should be available to allow Keene to pursue these claims by way of new pleadings in this case (see Fed. R. Civ. P. 15) or a new case. See *Irwin v. Veterans Admin., supra*. Keene should not be suddenly deprived of its opportunity to litigate its claims after it is too late to protect itself from loss of its legal rights.

ARGUMENT

I. THE FEDERAL CIRCUIT MISCONSTRUED SECTION 1500 AS BARRING THE CLAIMS COURT FROM ADJUDICATING PETITIONER'S CLAIMS.

The Federal Circuit's holding that Section 1500 barred the Claims Court from adjudicating Keene's two suits rested on two conclusions. First, the court of appeals held that two actions involve the "same" claim—*i.e.*, the non-Claims Court action is "for or in respect to" the claim in the Claims Court action—whenever they grow out of the same "operative facts," even if Congress has made clear that they are different in that the plaintiff (a) is entitled to bring both claims and (b) must bring them in separate suits in separate forums. Second, the court of appeals held that Section 1500 flatly bars the adjudication of a claim filed in the Claims Court whenever, at the time of that filing, the plaintiff had pending elsewhere another action for or in respect to the claim—even if the other action is no longer pending when the Claims Court adjudicates its case or acts on a motion to dismiss under Section 1500.

Rejection of either of these rulings requires reversal of the decision below. In fact, both rulings are wrong. At bottom, the flaw underlying both rulings is the same: they fundamentally misconstrue Section 1500 as a rigid and absolute jurisdictional restriction designed to force an election between remedies Congress has made available to persons harmed by the United States. But Section 1500 is a much more modest provision, designed simply to specify the order in which the Government must try multiple suits brought (as Congress has demanded) in different forums. This provision is not properly read to deprive Keene of the ability to have its claims against the United States in these cases heard by the Claims Court or, therefore, at all.

A. A Plaintiff's Claim in Another Case Against the United States Is Not "For or in Respect to" Its Claim in the Claims Court if the Plaintiff Is Required by Law to Bring the Two Claims in Different Cases.

The critical language of Section 1500 demanding a comparison of the claim in the Claims Court with the claim in another court is anything but precise. The latter suit must be "for or in respect to" the "claim" in the former. As the Federal Circuit itself recognized, this standard hardly has a single "plain" meaning. See *Johns-Manville*, 855 F.2d at 1560; *id.* at 1560 ("claim" is equivalent to "cause of action," which has no clear or uniform meaning); *United Mine Workers v. Gibbs*, 383 U.S. 715, 722, 724 (1966) ("cause of action" had no clear meaning in 1930s and remains "the source of considerable confusion").⁸

Notwithstanding this imprecision, the language and policy of Section 1500, as well as the precedent applying it and practical considerations, point strongly toward an interpretation different from that adopted by the Federal Circuit. The statute should be read to deem a claim in one case "for or in respect to [the claim]" in another only when ordinary claim-splitting preclusion principles would say that they should (and, therefore, could) be brought together if they were both brought against the United States. Any other reading (especially if combined with the Federal Circuit's "has pending" ruling) would produce predictable injustice in violation of established congressional policies. And the Federal Circuit's

⁸ Indeed, it is only through judicial construction that the term "claim" in the Tucker Act has been limited to monetary claims, even though it is not so restricted in numerous other contexts. See *Lee v. Thornton*, 420 U.S. 139 (1975); *Richardson v. Morris*, 409 U.S. 464 (1973); J. Steadman, D. Schwartz, S. Jacoby, *Litigation with the Federal Government* § 6.113 (2d ed. 1983).

"operative facts" interpretation, aside from ignoring the natural reference to preclusion law and producing such unjust consequences, is hard to apply and rests on a misunderstanding of, and overreliance on, the original meaning of the 1868 precursor to Section 1500.

1. Section 1500 Applies Only When Preclusion Law Would Prohibit Separate Suits on the Two Claims if Both Were Brought Against the United States.

The language and function of Section 1500 naturally point to the law of claim preclusion, or *res judicata*, as the best source for construing the provision. That body of law—particularly, the law governing "claim-splitting"—is the obvious place to look for guidance when construing a statute that uses the term "claim" (and also the phrase "cause of action") and that addresses when two claims may be litigated in separate cases. The terms "claim" and "cause of action" were precisely the terms of *res judicata* law in the nineteenth century. See *Cromwell v. County of Sac*, 94 U.S. 351, 353 (1877). And reference to claim-splitting law is likewise suggested by the undisputed policy against simultaneous dual litigation that underlies Section 1500. See U.S. Br. in Opp. 10 ("Section 1500 bars the Claims Court from exercising jurisdiction whenever a plaintiff seeks to litigate duplicative claims in the Claims Court and in another court at the same time.") (citing *In re Skinner & Eddy Corp.*, 265 U.S. 86, 95 (1924)).⁹

While naturally read as referring to the law of claim preclusion in using the phrase "claim for or in respect to,"

⁹ As discussed below (*see* pages 30-31, *infra*), moreover, although it is undisputed that Section 1500, like its predecessors, does not actually impose a preclusion rule, the 1868 precursor to Section 1500 was enacted in response to a specific limitation in the law of *res judicata*. See *Matson Navigation Co. v. United States*, 284 U.S. 352, 355-56 (1932) (1868 law was reaction to fact that the "other" suit "would not be *res adjudicata* in the suit pending in the Court of Claims"). This, too, supports reference to preclusion law in interpreting the statute.

the statute insists that no strict mutuality requirement limit its application. Thus, ever since the enactment of the 1868 precursor to Section 1500, the statute has provided that its rule would apply whenever the defendant in the non-Court of Claims action was acting under the authority of the United States. See note 16, *infra* (quoting predecessors to Section 1500). Indeed, until 1948, the statute applied *only* when there was non-mutuality, see *Matson, supra*, presumably because there were relatively few occasions before the enactment of the FTCA in 1946 when the United States (in contrast to its agents) could be sued at all outside the Court of Claims. Thus, Congress has insisted that, as long as the defendants are either the Government or its agents, the determination whether the claim in one case is "for or in respect to" the other must treat the agents as if they were the Government.

These considerations lead to an obvious interpretation of Section 1500. A claim brought outside the Claims Court is "for or in respect to" a claim in the Claims Court when claim-splitting law would treat them as the same—*i.e.*, require them to be joined in a single suit—if the two claims were both brought against the United States. On the other hand, the two claims do not bear that relationship—are not the "same"—when they *could* be brought separately if both were brought against the United States. In the usual Section 1500 case, then, where the two claims *are* both brought against the United States, the question is simply whether the law allows them to be brought separately—*i.e.*, does the bringing of the claims in separate suits constitute improper claim-splitting?

This test makes reference to an established body of law for its application. And in many, perhaps most, cases under Section 1500, including the present case, it is very easy to apply. For obvious reasons of fairness, preclusion law has long allowed separate and successive suits where, by law, a single court does not have jurisdiction to hear both claims and the plaintiff is legally entitled

to pursue both claims. See Restatement (Second) of Judgments § 24 comment a, § 26(1)(c) & comment c (1982); Restatement of Judgments § 62(a) & comment k, § 65(2) & comments g-k (1942). Under that principle, there is no Section 1500 bar when the claims in the Claims Court are within that court's exclusive jurisdiction—and thus could not have been joined in a single suit with the claims, independently available to the plaintiff, over which the other court had jurisdiction.

That principle readily resolves this case. Both *Keene I* and *Keene II* were brought under the Tucker Act for more than \$10,000; none of the three other actions at issue was brought under the Tucker Act. The Tucker Act suits could only have been brought in the Court of Claims. 28 U.S.C. § 1491; see J.A. 28-29; *Keene*, 700 F.2d at 845 n.13. The non-Tucker Act claims—notably, the claims under the FTCA—could not have been brought in the Court of Claims, but had to be brought in district court. 28 U.S.C. § 1346(b). And it is clear that Congress intended a person injured by the Government to be entitled to pursue both Tucker Act and non-Tucker Act remedies, notably relief under the FTCA. See *Hatzlachh Supply Co. v. United States*, 444 U.S. 460 (1980) (noting particularly that the Government agreed with this conclusion). Thus, the law not only allowed, but required, *Keene's* "claim splitting." That is enough to establish that the non-Tucker Act claims were not "for or in respect to" the Tucker Act claims.¹⁰

¹⁰ There is another reason why claim-splitting principles would not require dismissal of *Keene I* based on *Miller*, the only other case pending when *Keene I* was filed. *Miller* sought contribution and indemnity for the costs of one particular claimant in one case; *Keene I* sought recovery for thousands of additional and separate injuries to Keene Corp. Keene was not required to bring these claims together: indeed, it could have separately filed third-party actions against the United States in each of thousands of the underlying suits. At most, *Miller's* claim would have to be excised from *Keene I* (if it is included there). See Restatement (Second) of Judgments § 24.

It would be an odd construction of Section 1500 that would preclude a single action in the Claims Court in favor of thousands of

Indeed, any other conclusion would be hard to square with the congressional jurisdictional scheme. Congress has insisted that, whatever the difficulties of drawing the line in some cases, claims must be rigidly separated into those cognizable under the Tucker Act and those, like FTCA claims, that are not. The need for separation follows directly from the assignment of the claims to different courts. It would be highly anomalous, in light of this congressional treatment, to read Section 1500 in such a way as to treat an FTCA claim as effectively the same as a contract or takings claim under the Tucker Act.

Not surprisingly in light of these considerations, it was the clear law in the Court of Claims that Section 1500 did not apply where two claims could not both be brought in the same court. Thus, in *Casman v. United States*, 135 Ct. Cl. 647 (1956), the court held that a claim for reinstatement and a claim for damages must be different claims under Section 1500 because only the latter could be brought in the Court of Claims. In *Allied Materials & Equip. Co. v. United States*, 210 Ct. Cl. 714 (1976), the Court of Claims, relying on *Casman*, concluded that even two claims for monetary relief were not the same for purposes of Section 1500 if, because of the congressional jurisdictional scheme, they could not both be brought in a single court. *Id.* at 716 ("In neither court could [plaintiff] combine all its claims."). These principles were subsequently followed. See, e.g., *Prillman v. United States*, 220 Ct. Cl. 677 (1979) (following *Allied Materials* principle); *Boston Five Cents Sav. Bank v. United States*, 864 F.2d 137, 139 (Fed. Cir. 1988) (following *Casman*).

These principles deserve respect under the doctrine of *stare decisis*. See *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Beyond that, they were, in fact, established law when Congress "reenacted" Section 1500 in 1982, without change of anything but the court to

separate suits against the Government in district courts throughout the Nation.

which it applied: it newly applied to the Claims Court, which assumed the trial jurisdiction of the former Court of Claims. This Court has repeatedly applied the rule of statutory construction that "a reenactment, of course, generally includes the settled judicial interpretation. *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978)." *Pierce v. Underwood*, 487 U.S. 552, 567 (1988).¹¹ The 1982 legislation was the legal equivalent of a ratification of this settled practice through reenactment, because the practice is fully in harmony with surrounding law and because the 1982 enactment resulted from a broad congressional examination of the structure of the Court of Claims and of its jurisdiction, and included various substantive jurisdictional amendments, where Congress thought them necessary, along with the reorganization of the courts. See, e.g., 28 U.S.C. § 1491(a)(3) (adding certain equitable-relief powers), § 1631 (power to transfer rather than dismiss case where jurisdiction is lacking); S. Rep. No. 275, 97th Cong., 1st Sess. 1-41 (1981); *id.* at 22 ("Under existing law, this chapter [91] sets forth the jurisdiction of the Court of Claims. With the exception of Federal Tort Claims Act cases noted below, claims court jurisdiction is the same as Court of Claims trial jurisdiction.").

2. The Federal Circuit's "Operative Facts" Approach Is Vague and Produces Injustice Contrary to Clear Congressional Policy.

The Federal Circuit adopted a very broad conception of when two claims are the "same" for purposes of Section 1500 (or, more precisely, when one is "for or in respect to" another). Overruling *Casman* and its progeny, the court concluded that, regardless of whether two claims

¹¹ See also, e.g., *Johnson v. Home State Bank*, 111 S. Ct. 2150, 2155 (1991); *Cottage Sav. Ass'n v. Commissioner*, 111 S. Ct. 1503, 1509 (1991); *Merrill Lynch, Pierce, Fenner & Smith v. Curran*, 456 U.S. 353, 382 & n.66 (1982); *Cannon v. University of Chicago*, 441 U.S. 677, 698-99 (1979); *United States v. Board of Comm'rs*, 435 U.S. 110, 132-35 (1978); *Georgia v. United States*, 411 U.S. 526, 533 (1973).

should or even could be brought in the same suit, they are to be deemed the same if they grow out of the same "operative facts." But this approach not only runs afoul of *stare decisis* and the 1982 congressional ratification of clear pre-1982 law, but ignores the fact that, with only the exception of mutuality requirements, Section 1500 is naturally read to refer to claim-splitting law, which does *not* apply where jurisdictional barriers preclude joinder of claims in the same case. The approach would also violate other directly relevant congressional and judicial policies.

To begin with, the Federal Circuit's approach is indefinite and hard to apply. It demands a complex inquiry to determine whether the "operative" facts of two cases are the same. See *Johns-Manville*, 855 F.2d at 1563-67; *Keene Corp.*, 12 Ct. Cl. at 197-216. More fundamentally, a test requiring identification of the "operative" facts hardly provides clear guidance to courts or litigants on a question—whether a court has jurisdiction—that should not consume substantial resources or lead to needless confusion, at least where parties would thereby lose rights without means of self-protection. The interpretation we propose, by contrast, will in most cases be easy to apply: it simply requires asking whether the plaintiff's claim in another court is within the concurrent jurisdiction of the Claims Court. That question will rarely be difficult to answer: the core of jurisdiction in the Claims Court is exclusive (see 28 U.S.C. § 1491), with the most notable exception being jurisdiction under the Little Tucker Act, 28 U.S.C. § 1346(a), where concurrent jurisdiction turns simply on the amount sought (above or below \$10,000). The Federal Circuit's vaguer approach impairs the unquestioned policy against needless complexity of litigation. See, e.g., S. Rep. No. 275, *supra*, at 11; 127 Cong. Rec. 29888 (Dec. 8, 1981) (Sen. Simpson).

Aside from its intrinsic defects, the Federal Circuit's approach is critically flawed because its consequences

would be deeply out of harmony with the relevant legal landscape. This Court has made clear not only that Congress did not intend that persons would have to choose among the differing remedies offered them for Government-inflicted harm (*Hatzlachh Supply Co.*, *supra*) but that the Tucker Act was intended to be construed to provide justice to such persons.¹² In 1982, moreover, Congress directly acted to preclude the loss of rights through the running of statutes of limitations by virtue of jurisdictional defects: that was the announced purpose of the enactment of 28 U.S.C. § 1631, based on the recognition that jurisdictional complexities make such defects unavoidable. See S. Rep. No. 275, *supra*, at 11. And, as this Court has now made clear, Congress has adopted the same policy indirectly through its implicit authorization of the tolling of statutes of limitations where limitations periods have run through no fault of the plaintiff. See *Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990). All of these policies would be impaired by the apparently intended results of the Federal Circuit's ruling.

The well-recognized fact is that it is often difficult for a plaintiff to determine what cause of action properly fits its real complaint against the Government—or, therefore, where to sue. See S. Rep. No. 275, *supra*, at 11. Moreover, there are many circumstances where complete adjudication of a plaintiff's legal rights against the Government, and complete relief, plainly require filing in two

¹² See *United States v. Emery, Bird, Thayer Realty Co.*, 237 U.S. 28, 32 (1915) (it is an "inadmissible premise that the great act of justice embodied in the jurisdiction of the court of claims is to be construed strictly and read with an adverse eye"); *United States v. Mitchell*, 463 U.S. 206, 213-14 (1983) (quoting President Lincoln's statement, in proposing law that permitted Court of Claims to render final judgments, that "it is 'as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals'"; surveying purpose of Tucker Act to "'give the people of the United States what every civilized nation of the world has already done—the right to go into the courts to seek redress against the Government for their grievances'").

courts. For example, an injury by the Government may well, as here, give rise to legitimate claims sounding in tort and in contract: these claims must be brought in different courts (if more than \$10,000 is sought). And the Claims Court, which until recently was all but precluded from awarding equitable relief, even today has power to award equitable relief in only defined classes of cases. 28 U.S.C. § 1491(a)(2), (a)(3).¹³ In many cases, therefore, unlawful or wrongful action by the Government must be challenged in district court to stop it, with damages sought separately in the Claims Court.¹⁴ Thus, dual "related" suits based on the same "operative facts" are inevitable.

In these and other situations, persons harmed by the Government would be unfairly burdened by the Federal Circuit's rule that no claims growing out of the same "operative facts" could be brought simultaneously in the Claims Court and elsewhere. In many situations, judicial efficiency would independently counsel that at least pre-trial discovery and other proceedings move ahead on the separate claims in the Claims Court. This is true, for example, where the "other" action is being seriously challenged on jurisdictional grounds, so that no litigation on

¹³ See *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988) ("The Claims Court does not have the general equitable powers of a district court to grant prospective relief. Indeed, we have stated categorically that 'the Court of Claims has no power to grant equitable relief.'" (footnote containing citations omitted); note 8, *supra*.

¹⁴ For example, a division of jurisdiction would require two suits where Government action violates trust responsibilities to Indian Tribes. See *Br. Amici Curiae of the Cheyenne-Arapaho Tribes of Oklahoma and the Southern Ute Indian Tribe*. A similar division would affect the filing of (temporary) takings claims and injunctive claims against government action. See *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987). See also *Br. Amicus Curiae for Dico, Inc.* (takings and due process claims must be filed in Claims Court, while Superfund statute, 42 U.S.C. § 9606(b)(2)(B), directs to district court actions challenging EPA denial of claim for reimbursement of environmental clean-up costs).

the merits is being conducted in that proceeding. It is particularly true where such a suit already has been dismissed by the district court on such grounds and what is "pending" is an appeal that may take years to be completed. During all of this time, the litigation of the claims against the Government, properly brought in the Claims Court, would simply be stalled. The resulting delay is unjust to the claimants as well as to the judicial system, not only because relief is postponed but because the passing of time may well result in the forfeiture of rights, and impairment of the truth-finding process, as evidence is lost over time.

The harm caused by the Federal Circuit's approach would be particularly severe, if, as that court may well have thought, equitable tolling would not be available in a new suit filed in the Claims Court after the actions outside that court are over.¹⁵ If the statute of limitations were to run throughout the period of litigation in another forum, claims would predictably be lost. By the time that other litigation is completed, the entire claim in the Claims Court might be time-barred; alternatively, large parts of the claim might be barred, as earlier injuries resulting from a "continuing course of conduct" steadily become no longer actionable with the inexorable advance of the years. Thus delaying and denying justice based on a "technical" "jurisdictional" rule is not only unfair to litigants who are doing everything possible to secure a timely and accurate resolution of their claims, and wasteful of

¹⁵ Although Chief Judge Nies suggested in her concurrence that equitable tolling should be available, the majority of the Federal Circuit did not adopt, or even address, that suggestion. And its (erroneous) view that Section 1500 is a true election-of-remedies provision tends to suggest the unavailability of such tolling.

As argued below (see pages 45-47, *supra*), equitable tolling should be held available here. This issue is intertwined with the merits of the Federal Circuit's reading of Section 1500 and therefore should be decided if the Court believes that other aspects of the relevant statutory analysis point toward acceptance of the Federal Circuit's reading.

judicial resources, but contrary to congressional policies against the loss of rights in just such circumstances.

This case illustrates how severe the delays and losses can be. Keene has vigorously sought to obtain an adjudication of its claims against the Government in an efficient manner. Given the nature of its claims, Keene had no choice but to bring its claims both under the FTCA and under the Tucker Act. Keene sought to do so in a manner that consolidated the thousands of related underlying claims into one proceeding in district court and one proceeding in the Court of Claims. It then took more than seven years, from the start of the New York case to the end of the District of Columbia case, to be told that the FTCA action could not proceed as brought. During that long period, if the Federal Circuit's rule had been in place, none of the pre-trial preparation that in fact occurred in the Claims Court during those years would have occurred: all litigation would have had to begin *after* that seven-year wait. And if the statute of limitations was running during that time, Keene would lose large shares of its claim against the Government—thousands of the underlying claims would fade into the non-actionable past—all through no fault of its own. Section 1500 should not be construed to produce such a result.

3. *The Federal Circuit's Approach Is Not Required By the Legislative History.*

The Federal Circuit rested its approach on its view that Congress intended Section 1500 to preclude duplicative litigation and to require an election of remedies. Pet. App. A14, A16; *Johns-Manville*, 855 F.2d at 1563. But, as an initial matter, Section 1500 is completely unnecessary to address the former concern: the ordinary rules of both claim and issue preclusion are fully available to prevent a party from relitigating claims and issues against the Government. See, e.g., *United States v. Stauffer Chem. Co.*, 464 U.S. 165 (1984); *Nevada v. United States*, 463 U.S. 110 (1983). And even aside from the clear congressional intent that both Tucker Act and

FTCA remedies be available to plaintiffs (*Hatzlachh Supply, supra*), neither a preclusion nor an "election of remedies" reading of Section 1500 can be sustained under the language of the provision itself. As the Government concedes: "The jurisdictional bar of Section 1500 remains in force until suit or process in the other court is terminated. Once the other suit is terminated, the plaintiff may then sue in the Claims Court, as long as the action is not barred by the statute of limitations." Br. in Opp. 11. Thus, Section 1500 is by its terms only a *timing* provision. *Id.* at 10 (section applies only while claims are pending in two courts "at the same time").

In this light, the Federal Circuit's reliance on legislative history was a mistake. What the Federal Circuit thought critical was the history of the original precursor to Section 1500—an 1868 Act.¹⁶ But that is already some

¹⁶ Section 1500, enacted in 1948, was based on Section 154 of the 1911 Judicial Code (Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1138), codified at 28 U.S.C. § 260 (1946), which read as follows:

No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

That provision, enacted without congressional explanation, was a reenactment of Rev. Stat. § 1067 (1874), itself unaccompanied by explanation. The original precursor statute was Section 8 of the Act of June 25, 1868, ch. 71, 15 Stat. 77, which read as follows:

And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of [sic] the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

distance from the provision actually at issue, enacted in 1948.¹⁷ And, of course, substantial changes in the relevant statutory landscape governing the accessibility of the United States to suit—*e.g.*, the passage of the Tucker Act in 1887, the passage of the FTCA in 1946—were made after the 1868 Act. Those changes mean, in particular, that the United States today regularly faces multiple related suits outside the Claims Court, wholly unaffected by Section 1500: indeed, Keene itself could have filed third-party actions against the Government in each of thousands of suits outside the Claims Court. The 1868 Congress could hardly have addressed the role of Section 1500 in this new context—or intended that a multiplicity of separate suits in district courts was to be preferred to a single “consolidated” action in the Claims Court.

In any event, the legislative history of the 1868 enactment is sparse. During the Civil War, Congress had authorized seizure of Confederate property but then provided that claimants to the property could recover proceeds from the sale of the seized property in the Court of Claims by proving ownership, as long as they also proved that they had not aided the rebellion. Captured and Abandoned Property Act of 1863, ch. 120, § 3, 12 Stat. 820. Claimants for seized cotton, in addition to suing the United States in the Court of Claims, began suing federal officers in other courts, “presumably on a theory of conversion.” Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Georgetown L.J. 573, 577 (1967). The 1868 Act was introduced with the following explanation by its sponsor, Senator Edmunds:

The object of this amendment is to put to their election that large class of persons having cotton

¹⁷ The Revision Notes in 1948 say that “[c]hanges were made in phraseology.” They contain that statement even though the enactment made an important substantive change in prior law: it extended the statutory bar to cases where the “other” suit was brought against the United States, thereby overturning this Court’s decision 16 years earlier in *Matson*, *supra*.

claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

Cong. Globe, 40th Cong., 2d Sess. 2769 (1868).

This passage does not offer any elaboration of the congressional understanding of when two claims were the “same” for purposes of the new statutory bar. Beyond that, the difficulty with the passage is that it says more about Senator Edmunds’ goals than it does about what the statute itself actually says and does. Senator Edmunds seemed to hope for preclusion of a second adjudication after a first decision on the merits; but even this statement does not define when two claims were to be deemed the same, and in any event, Section 1500 simply cannot be read as a preclusion rule: as the Government has acknowledged, it is only a sequencing provision. *Br. in Opp.* 11. Similarly, the reference to “election” does not define when two claims were to be deemed the same; and it cannot, in any event, be read as forcing an election of remedies, except as to the timing of particular suits. *Ibid.*; pages 28-29, *supra*. All that Senator Edmunds’ statement establishes, in the end, is a conclusion unhelpful to the definition of when two claims are to be considered the same—that behind the original statute lay a general policy seeking to protect the Government against the burdens of multiple simultaneous litigation. And that policy, at least in today’s legal context, cannot support a reading of Section 1500 that predictably produces forfeitures of legal rights, especially since preclusion law and the au-

thority to coordinate multiple litigation through stays fully effectuate the statutory policy.

The Federal Circuit believed that it had to adopt a broad "operative fact" theory in order to ensure that its view of the statute would cover the "cotton claims" that were the object of the 1868 legislation. *Johns-Manville*, 855 F.2d at 1564-65. But even if the 1868 intent were controlling, the court's inference would be wrong. The interpretation of Section 1500 that we advance does cover the cotton claims: a plaintiff could *not* bring separate suits against the United States both under a theory of common law conversion and under the Captured and Abandoned Property Act.

One reason is simply the special nature of the United States as a defendant: a cause of action for conversion was wholly unavailable against the United States because sovereign immunity had not been waived for torts. But even aside from the special sovereign immunity protections of the United States, the law against claim splitting in the nineteenth century apparently would have precluded the dual litigation of the cotton claims if both suits were brought against the same defendant. The conversion claim was a "lesser included offense" of the statutory claim growing out of the same transaction: *i.e.*, proof of the latter would have sufficed to prove the former. In that circumstance—at least where the plaintiff's injury and the defendant's wrong were the same (and only a "clean hands" qualification for suit distinguished the claims)—claim splitting evidently would have been barred under even the narrower *res judicata* principles then prevalent. See *Nevada v. United States*, 463 U.S. at 130 n.12; *The Haytian Republic*, 154 U.S. 118, 125 (1894); Restatement of Judgments § 61. The Federal Circuit's reason for departing from the standards of preclusion law is therefore invalid as well as insufficient.

B. Section 1500 Does Not Bar the Claims Court from Adjudicating a Case If the Plaintiff's Other Suit Is No Longer Pending.

Section 1500 declares that the Claims Court "shall not have jurisdiction of any claim" if the plaintiff "has pending" elsewhere certain other suits. The court of appeals read that language to mean that if a plaintiff had a suit pending in another court at the time it filed an action in the Claims Court, the Claims Court action must be dismissed—even after the other suit is over and even if neither the Claims Court nor the Government had raised the "jurisdictional defect" during years of litigation in the Claims Court. The court did not doubt that the Claims Court action could immediately be refiled—unless, of course, the statute of limitations had run. But it held that, under Section 1500, there can be no jurisdiction to adjudicate the original Claims Court case if there was no jurisdiction to receive the case on the docket at the time of filing. This ruling gives an improper reading to the statute, which should not be construed to bar adjudication of a case once no related suit is any longer pending.

1. The "Jurisdiction" Language of Section 1500 Does Not Make the Time of Filing Dispositive.

As a matter of ordinary usage, the Federal Circuit's ruling is hardly compelled by the statutory language, which does not by its terms tie jurisdiction to adjudicate to events at the time of filing. Any such reading could only be drawn by looking outside the language of the provision. The court of appeals reasoned that, because Section 1500 speaks of "jurisdiction," the statute must be construed by borrowing the general rule, drawn from diversity cases, that subject matter jurisdiction is determined by the facts upon filing. See *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957). But there are good reasons why the borrowing and rigid application of that rule is unnecessary and, indeed, inappropriate here.

To begin with, the provisions surrounding Section 1500 suggest that "jurisdiction" be assessed at the time of rendering judgment. The various provisions in chapter 91 of Title 28, U.S. Code, define the "jurisdiction" of the Claims Court. In doing so, they repeatedly use the expression "jurisdiction to render judgment upon" interchangeably with "jurisdiction of [a claim or action]" and similar phrases. See 28 U.S.C. § 1491(a)(1) ("render judgment"), § 1491(b) ("of any civil action"), § 1494 ("determine . . . render judgment"), §§ 1495-1497, 1499 ("render judgment"), §§ 1500-1502 ("of any claim"), § 1503 ("render judgment"), § 1505 ("of any claim"), § 1507 ("to hear any suit for and issue a declaratory judgment"), § 1508 ("to hear and to render judgment upon"), § 1509 ("to hear"). Of course, if Section 1500 said that the Claims Court did not have "jurisdiction to render judgment upon a claim for or in respect to which" the plaintiff "has pending" another suit, its language would all but preclude any borrowing of the time-of-filing rule. The immediate context of Section 1500 thus supports our view.

So, too, does the inconsistency in the positions of the Government and Federal Circuit themselves about the borrowing of the time-of-filing rule. That rule does not work only one way: just as jurisdiction must generally exist at the time of filing, jurisdiction is generally not lost by virtue of events occurring after the filing. See *Mollan v. Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824). In particular, "where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964) (quoting *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1849)). Yet both the *en banc* Federal Circuit (Pet. App. A18-A19) and the Government (Br. in Opp. 9-10) take the opposite position: they argue that *Tecon Eng'rs* was wrong and hence that the Claims Court automatically loses jurisdiction if another case

is subsequently filed in another court (if it is "for or in respect to" the Claims Court claim).¹⁸ They cannot have it both ways—insisting on the rigid "jurisdictional" character of Section 1500 so as to borrow the time-of-filing rule, while repudiating that rule when its consequences seem to them to undermine the statute's policy.¹⁹

In any event, even if the term "jurisdiction" suggests looking to the time-of-filing rule, there is no compulsion rigidly to adopt that rule. In fact, this Court has clearly recognized that, even as to the true grant of subject matter jurisdiction in the diversity context, the time-of-filing rule is not absolute: it has exceptions. Most notably, this Court has held that diversity jurisdiction, though not in fact present at the filing of a case, can retroactively be created by the dismissal of a non-diverse party—even while the case is on appeal. *Newman-Green*,

¹⁸ If this view of *Tecon* is right, moreover, then this Court's decision in *Pennsylvania R.R. v. United States*, 363 U.S. 202 (1960), indicates that Section 1500 is not "jurisdictional" in the sense of a non-waivable constraint on subject matter jurisdiction. There, in an appeal from a decision of the Court of Claims, this Court raised no question about the lower court's jurisdiction—indeed, it necessarily presupposed jurisdiction in rendering its ruling that the case should simply be stayed—even though a district court action on the identical claim had been filed after the filing of the Court of Claims action (and was still pending), a fact that, under the Government's current view of Section 1500, would have barred jurisdiction under Section 1500. 363 U.S. at 203-04. If Section 1500 were a non-waivable matter of subject matter jurisdiction, the Court would have been obliged to consider the question and, on the Government's view of *Tecon*, hold that the Court of Claims lacked jurisdiction. See, e.g., *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702 (1982) (Court must consider lower court's jurisdiction); *United States v. Corrick*, 298 U.S. 435, 440 (1936); *Mansfield, C. & L.M. Ry. v. Swan*, 111 U.S. 379, 382 (1884).

¹⁹ Similarly, it is hardly consistent with a view of Section 1500's "jurisdictional" character for the Government to have abandoned its Section 1500 argument in 1980 (based on the later-filed New York action) for "tactical" reasons (12 Cl. Ct. at 199) or to have waited until 1987 before it finally sought dismissal under Section 1500 based on the pendency of other suits at the time of filing (and even then only after prompting by the Claims Court).

Inc. v. Alfonso-Larrain, 490 U.S. 826 (1989). Thus, even when a case was outside any grant of affirmative jurisdiction during its entire pendency in the trial court, that defect—which is more than a defect of mere pleading—may be cured by post-filing events. The Court relied on practical considerations, explaining that “because law is an instrument of governance rather than a hymn to intellectual beauty, some consideration must be given to practicalities.” *Id.* at 837 (internal quotation marks omitted).²⁰

Such an approach is all the more strongly warranted for a provision like Section 1500. This provision does not define a federal court’s power that otherwise would not exist. Jurisdictional grants like 28 U.S.C. §§ 1331 or 1332, by contrast, give federal courts their very power to act. If a court assumes jurisdiction nowhere given it by any such grant, the result is a kind of *ultra vires* usurpation of authority that implicates the fundamental constitutional principles of federalism (federal court authority, like any federal authority, displaces some state authority) and separation of powers (lower federal courts are created and generally must have their jurisdiction defined by Congress). See *Finley v. United States*, 490 U.S. 545, 552-53 (1989). Section 1500 is different: it applies, as here, in cases that the Claims Court has already been given the (exclusive) power to decide (by the Tucker Act) and thus does not implicate comparable concerns about usurpation of state or congressional authority. If retroactive “cures” of defects are appropriate even with re-

²⁰ See also *Willy v. Coastal Corp.*, 112 S. Ct. 1076, 1080 (1992) (“A final determination of lack of subject-matter jurisdiction of a case in a federal court, of course, precludes further adjudication of it. But such a determination does not automatically wipe out all proceedings had in the district court at a time when the district court operated under the misapprehension that it had jurisdiction.”); *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (noting that Court has followed a “‘practical’ approach” in applying the finality requirements of 28 U.S.C. §§ 1257 and 1291 “so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered”).

spect to grants of subject matter jurisdiction, as in *Newman-Green*, they are all the more obviously appropriate for a mere litigation-coordination provision like Section 1500.²¹

Indeed, this Court has made clear in analogous contexts that quite similar “jurisdictional” constraints are not necessarily rigid, but may be flexibly construed in accordance with relevant policies. For example, as the Government has explained in this case, the extent of the Government’s waiver of sovereign immunity, including in statutes of limitation governing suits against the United States, defines the jurisdiction of the court over such suits. Br. in Opp. 13 (quoting *United States v. Testan*, 424 U.S. 392, 399 (1976)) (“the United States, as sovereign, ‘is immune from suit save as it consents to be sued . . . and the terms of its consent to be sued in any court define that court’s jurisdiction’”) (in turn quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)); see also *United States v. Mitchell*, 463 U.S. at 212 (“It is axiomatic that . . . the existence of consent is a prerequisite for jurisdiction.”). Yet, as this Court has made clear, equitable tolling—a highly practical doctrine keyed to promoting justice—applies to statutes of limitations in suits against the United States. *Irwin v. Veterans Admin.*, *supra*.

Similarly, in the Social Security setting (and related disability and Medicare contexts), this Court has made

²¹ This result is particularly appropriate as applied to *Keene I*, which was held barred because the third-party action in *Miller* was pending when *Keene I* was filed. *Miller* was voluntarily dismissed without prejudice. It is well-established that such a dismissal “leaves the situation as if the action had never been filed.” 9 C. Wright & A. Miller, *Federal Practice and Procedure: Civil* § 2367, at 186 (1971 & Supp. 1992) (citing cases); see *Brown v. Hartshorne Pub. School Dist. No. 1*, 926 F.2d 959, 961 (10th Cir. 1991); *Sandstrom v. Chemlawn Corp.*, 904 F.2d 83, 86 (1st Cir. 1990); *Navajo Tribe of Indians v. United States*, 601 F.2d 536, 540 (Ct. Cl. 1979); *Humphreys v. United States*, 272 F.2d 411 (9th Cir. 1959); *A.B. Dick Co. v. Marr*, 197 F.2d 498, 502 (2d Cir.), *cert. denied*, 344 U.S. 878 (1952); *Maryland Cas. Co. v. Latham*, 41 F.2d 312 (5th Cir. 1930).

clear that the exhaustion requirement of 42 U.S.C. § 405(g) is "central to the requisite grant of subject matter jurisdiction." See *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975). At the same time, the Court has recognized that this "statutorily specified jurisdictional prerequisite" is "not precisely analogous to the more classical jurisdictional requirements contained in such sections of Title 28 as 1331 and 1332." *Id.* at 766. The Court has in fact held that not all of those requirements are "purely 'jurisdictional' in the sense that [they] cannot be 'waived' " or, indeed, subjected to judicial abrogation where practical and equitable considerations demand. See *Mathews v. Eldridge*, 424 U.S. at 328.²² There is no more reason why Section 1500, a timing provision somewhat like an exhaustion rule, requires the rigid interpretation adopted by the Federal Circuit. The language of "jurisdiction" does not compel that reading.

2. Section 1500's History and Policy Allow Adjudication of the Claims Court Suit Once the Plaintiff's Other Suit Is Over.

If the language of Section 1500 does not by its terms answer the question, the relevant history and policy do. Until the Federal Circuit's ruling in this case, clear and longstanding precedent established that a "defect" at the time of filing did not oust the Court of Claims (and its successor court) of the power to adjudicate the case. While this Court has not spoken to the issues in its few decisions under Section 1500 or its predecessor statutes,²³

²² In another context, this Court held in *Gomez v. United States*, 490 U.S. 858, 876 (1989), that a magistrate lacked "jurisdiction" to select a jury. Two Terms later, however, without repudiating that characterization, the Court held, at the urging of the Government, that the "jurisdictional" label did not prevent a party from waiving the right. *Peretz v. United States*, 111 S. Ct. 2661 (1991); Br. for United States in *Peretz*, No. 90-615, at 24. As the United States there pointed out, "The word 'jurisdiction' is a 'many-hued term.'" *Ibid.* (quoting *United States v. Wey*, 895 F.2d 429, 431 (7th Cir.), cert. denied, 110 S. Ct. 3283 (1990)).

²³ In *Corona Coal Co. v. United States*, 263 U.S. 537 (1924), the plaintiff received an adverse Court of Claims decision on the merits,

the Court of Claims repeatedly did, establishing the clear rule that pendency of another case at the time of filing did not preclude later adjudication once the other case was over.

In *Brown v. United States*, *supra*, the Court of Claims, having earlier dismissed the case while the same claim (a takings claim) was pending in a district court, vacated the dismissal once the district court had dismissed the claim. 358 F.2d at 1004-05. The court held that, once the other action was "no longer 'pending in any other court,' . . . [t]he plaintiffs could undoubtedly file a new petition, without any bar through Section 1500; it does not seem fair or make sense to insist that that must be done—with the limitations difficulties it may well entail." *Ibid.* The court also observed that "Section 1500 was not intended to compel claimants to elect, at their peril, between prosecuting their claim in this court (with conceded jurisdiction, aside from Section 1500) and in another tribunal which is without jurisdiction." *Id.* at 1005. The court thus allowed adjudication of the case once the other suit was over.²⁴

then took an appeal to this Court; but before the appeal, he filed the very same cause of action in another case. This Court dismissed the appeal under Section 1500's predecessor (Section 154 of the 1911 Judicial Code), rejecting a plea of necessity and relying on the plain words of the statute: the other case involved the identical claim and was still pending. *Id.* at 540. In *In Re Skinner & Eddy Corp.*, 265 U.S. 86 (1924), the Court, after holding that the plaintiff in the Court of Claims action had a right to voluntarily dismiss its case, went on to note that a post-dismissal action in another court on the very same cause of action made it impossible in any event, under Section 154, to resume the Court of Claims action. *Id.* at 96. And in *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932), the Court held, based on the literal terms of Section 154, that the provision did not apply where the other pending suit was against the United States. (In 1948, Section 1500 was written specifically to change this ruling.) None of these cases involved, or addressed, the issue of barring a Court of Claims action after the other suit was over.

²⁴ The court distinguished the one prior case, under Section 1500's predecessor, where the related action was no longer pending when

The natural implication of *Brown's* holding was subsequently drawn: a case in the Court of Claims should be suspended, not dismissed, when the same claim is pending elsewhere. *Hossein v. United States*, 218 Ct. Cl. 727 (1978). This practice—or its equivalent, dismissal subject to automatic reinstatement *nunc pro tunc*—became the settled practice in the Court of Claims and, later, the Claims Court and Federal Circuit. See *Prillman v. United States*, 220 Ct. Cl. 677 (1979); *National Steel & Shipbuilding Co. v. United States*, 8 Cl. Ct. 274 (1985); *Boston Five Cents Sav. Bank, supra*; *Connecticut Dep't of Children & Youth Servs. v. United States*, 16 Cl. Ct. 102 (1989). And this reading not only is entitled to respect under *stare decisis* but was effectively ratified in 1982, when Congress amended the provision without changing anything but the court to which it applied. See pages 22-23, *supra*.

No other evidence of congressional intent requires a different conclusion. The pre-1948 language, though addressed to both filing and prosecution of a case, is not of course the present language. More important, nothing in that language would require the rigid view that an improper filing was a non-waivable jurisdictional defect, which forever barred adjudication of the case, regardless of practical and equitable considerations. Moreover, as already noted (*see* pages 29-30, *supra*), any reliance on the 1868 history is dubious given the transformations of the surrounding legal landscape that have occurred since then. As also already noted, the legislative history of the original 1868 provision does not support anything

the Court of Claims dismissed the case before it, *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940). The court in *Brown* observed that *British American* had "emphasized several times that the determination of the other court was on the merits." 358 F.2d at 1005 (citing 89 Ct. Cl. at 441). The *Brown* court thus treated *British American* as in essence a preclusion case—which it plainly would be today, now that mutuality is not a requirement for preclusion. See *Blonder-Tongue Lab., Inc. v. University of Illinois Found.*, 402 U.S. 313 (1971).

but the conclusion that a general policy against simultaneous dual litigation underlies the provision.

That policy simply does not support the Federal Circuit's rigid and "jurisdictional" rule that dismissal is automatically required of an action in the Claims Court if it was filed at a time when another suit was pending elsewhere. This case perfectly illustrates why. Not only did the intended beneficiary of the statute not invoke it to escape supposed burdens of litigation for close to a decade—and even then only at the prompting of the court—but now, years after any other suit is pending, there cannot any longer be any simultaneous multiple litigation. The only conceivable benefit to the Government from such a dismissal is the running of the statute of limitations, which is, at least under current law, an illegitimate benefit. Moreover, any concerns about giving parties a "second bite at the apple" are fully addressed by the law of issue and claim preclusion. The policy against multiple simultaneous litigation thus cannot support the Federal Circuit's bar on adjudication in these circumstances. Indeed, the Federal Circuit's reading could have the perverse effect of undermining Section 1500's general policy by forcing claimants like Keene to file thousands of third-party actions in district court, unconstrained by Section 1500.

Section 1500's litigation-coordination policy is thus satisfied by reading it as decisional law did for a quarter century prior to the *en banc* decision in this case. The proper way to "avoid duplicative litigation" is not through any "precise rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976); *see Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183 (1952) ("Wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solutions of such problems."). It is instead through the more flexible and traditional approach of staying proceedings where appropriate. A proceeding in the Claims Court may be

stayed pending resolution of another suit if the other suit is closely enough related that substantial savings of litigation resources can be expected from allowing the other suit to proceed to resolution.²⁵ Most obviously, this will be true when major issues in the Claims Court proceedings will be resolved, with preclusive effect, in the other suit. By contrast, no stay would be appropriate where, for example, the other case does not involve litigation on the merits, at least while it is on appeal from dismissal for jurisdictional reasons.

Although the authority and responsibility to stay proceedings to avoid multiple overlapping litigation does not derive only from Section 1500, the provision performs two important, if modest, roles. First, it bars the Claims Court from actually adjudicating a claim covered by the provision. Second, it changes the usual rules governing the coordination of multiple suits. The normal rule is that the first-filed suit is the one to go forward. See *Smith v. M'Iver*, 22 U.S. (9 Wheat.) 532, 535 (1824). Section 1500 makes clear that in this context, regardless of which case is filed first, the Claims Court must be the one to defer. See *Pennsylvania R.R.*, *supra*. The modesty of these functions is appropriate to the statutory policy.

II. EVEN IF THE FEDERAL CIRCUIT'S CONSTRUCTION OF SECTION 1500 IS CORRECT, PETITIONER'S CLAIMS SHOULD NOT BE BARRED.

If this Court concludes that Section 1500 was properly construed by the Federal Circuit, it should nevertheless make clear that petitioner's Tucker Act claims against the United States are not barred. First, any such ruling would indisputably establish a new rule of law, and the application of that rule to Keene, which relied on contrary prior law that is now overruled, would be highly inequitable. Despite the "jurisdictional" label, this rule should be applied only prospectively, and not require dis-

²⁵ In fact, there is no reason why suspension of proceedings should automatically require that the other suit meet the "claim for or in respect to" standard of Section 1500.

missal here, whether as a matter of choice of law or as a matter of remedial law. See *American Trucking Ass'n v. Smith*, 496 U.S. 167 (1990); *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971). Second, and in any event, the Court should make clear that Keene may present these claims—either through an amended or supplemental pleading or by a new complaint—and not face a statute-of-limitations bar: this is a classic case for equitable tolling during the pendency of the present suits if they are held to have been jurisdictionally defective.

A. Retroactive Relief Is Not Appropriate.

In *Chevron Oil*, this Court held that a decision may be applied only prospectively based on a three-factor test focusing on the upsetting of reliance interests. 404 U.S. at 106-07. In *American Trucking Ass'n v. Smith*, four Justices applied that test to the question of retroactivity as a matter of choice of law (496 U.S. at 176-200 (O'Connor, J., joined by Rehnquist, C.J., White, J., and Kennedy, J.)), while four Justices indicated that they viewed the *Chevron* analysis as establishing a remedial principle, particularly in the area of statutes of limitations (*id.* at 219-24 (Stevens, J., joined by Brennan, J., Marshall, J., and Blackmun, J.)). That dispute need not be resolved in the present case, where the remedial law and the "substantive" law are both federal law subject to this Court's authoritative pronouncement. Here, whether as a choice-of-law principle or as a remedial principle, the *Chevron* doctrine is appropriately applied.

There can be no doubt that *Chevron* calls for pure prospectivity in this case if the Court adopts the Federal Circuit's reading of Section 1500. First, that reading establishes "a new principle of law . . . by overruling clear past precedent on which litigants may have relied." *Chevron*, 404 U.S. at 106. Second, the purpose of Section 1500 is only to define the sequence of multiple litigation against the Government; that purpose would not be served, indeed it would be retarded, by applying Section 1500 now to bar jurisdiction over claims in the Claims

Court once the plaintiff's other litigation is over. *Id.* at 106-07. Third, retroactive application of the new rule to require dismissal of the present complaints, as the Federal Circuit held, "could produce substantial inequitable results." *Id.* at 107. After all, Keene filed these cases more than a decade ago, at a time when clear law permitted it to do exactly what it did, and was never told until the Claims Court ruling in 1989 that it may have made a misstep in 1979 and 1981. Any ruling that would bar these claims, and allow the United States to escape an adjudication of its liability on these claims (reaching as far as back as the limitations period would allow for suits filed in 1979 and 1981), would produce manifest "injustice" and "hardship" that should be avoided by a holding of nonretroactivity. *Ibid.*

The Federal Circuit rejected application of *Chevron* on the simple ground that "by definition, a jurisdictional ruling may never be made prospective only." Pet. App. A23 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981)). That ground is insufficient. In addition to the fact that this Court made a jurisdictional ruling prospective in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), the provision at issue in this case, even if "jurisdictional" in a sense sufficient to implicate the "time of filing" rule, need not and should not be treated as "jurisdictional" in the sense that was critical in *Firestone*. There, the Court's decision made clear that the case was wholly outside any grant of power to the court of appeals to hear cases (there was no "final decision" reviewable under 28 U.S.C. § 1291); in that situation, the court was effectively acting *ultra vires* when it adjudicated the merits of the case (*i.e.*, the validity of the appealed order). In the present situation, by contrast, the Claims Court has explicitly been granted power under the Tucker Act, 28 U.S.C. § 1491, to hear and to decide precisely this type of case. And even if Section 1500 may have originally barred the filing of the case, the Claims Court is hardly acting *ultra vires* when—after no other suit is pending

—it adjudicates the merits of the case.²⁶ In these circumstances, therefore, application of *Chevron* principles to preclude retroactive relief is proper.

B. Equitable Tolling Is Necessary.

Even if this Court were to adopt the Federal Circuit's interpretation of Section 1500, it should make clear that, if Keene refiles the same claims, equitable tolling would be available to eliminate any limitations bar. Refiling may occur either through the filing of a new complaint or through an amended or supplemental complaint under Rule 15 of the Rules of the Claims Court—identical to Rule 15, Fed. R. Civ. P. In both situations, however, the central issue in a case such as this is whether equitable tolling of the statute of limitations is available. Thus, even when a new pleading in the original case relies on occurrences post-dating the original filing (*see* Rule 15(d)), relation back of the pleading is appropriate where, as here, the very same claims are alleged, the defendant is not conceivably prejudiced, and the "supplemental complaint alleges an occurrence that corrects a defective allegation of jurisdiction," at least as long as the statute of limitations has not run. 3 J. Moore & R. Freer, *Moore's Federal Practice* ¶ 15.16[2.-2], at 15-183 to 15-184 (2d ed. 1992); *see Fujii v. Dulles*, 224 F.2d 906 (9th Cir. 1955); 6A C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure: Civil* 2d § 1508, at 200-05 (1990). In this case, then, the only question is whether equitable tolling should suspend the running of the 6-year statute of limitations for Tucker Act claims,

²⁶ This distinction is mirrored in the rule that a final judgment generally may not be collaterally attacked on the ground that the court lacked subject matter jurisdiction—*unless* "there is a plain usurpation of power, when a court wrongfully extends its jurisdiction beyond the scope of its authority." *Kansas City S. Ry. v. Great Lakes Carbon Corp.*, 624 F.2d 822, 825 (8th Cir.), *cert. denied*, 449 U.S. 955 (1980). *See Kalb v. Feuerstein*, 308 U.S. 433, 439 (1940); Restatement (Second) of Judgments § 12(2); 7 J. Moore, *Moore's Federal Practice* ¶ 60-25[2], at 60-228 to 60-230 (2d ed. 1992).

28 U.S.C. § 2401(a), during the pendency of these cases in the Claims Court.

That question has a clear answer in the present circumstances. This Court held in *Irwin v. Veterans Admin.*, 111 S. Ct. at 457-58, that equitable tolling of statutes of limitations is available in suits against the United States. Such tolling is appropriate "where the claimant has actively pursued his judicial remedies by filing a defective pleading." *Id.* at 458.²⁷ The central requirement is that the plaintiff not have "slept on his rights but, rather, has been prevented from asserting them." *Burnett v. New York Cent. R.R.*, 380 U.S. 424, 429 (1965). This case fits squarely under that description.

Following the clear law in the area, Keene did everything possible to preserve its Tucker Act claims. Keene was required to pursue claims under different statutes in different courts: Congress has routed the different claims to different courts—the FTCA claims to district court, 28 U.S.C. § 1346(b); the Tucker Act claims for more than \$10,000 to the Claims Court, 28 U.S.C. § 1491(a)(1). This Court has made clear that Congress did not intend that a plaintiff have to elect one or the other remedy, but was entitled to pursue remedies under both the FTCA and the Tucker Act. *See* page 21, *supra*. The decisional law under Section 1500, as we have discussed and as the Federal Circuit acknowledged, permitted Keene to file both cases simultaneously. Moreover, the Government did not make a move to raise a Section 1500 issue until years after the litigation had been commenced. (Had the new rule been announced, of course,

²⁷ This is supported by the congressional policy embodied in 28 U.S.C. § 1631, which authorizes a court without jurisdiction to transfer a case, rather than dismiss it, for the specific purpose of avoiding limitations problems. *See also Herb v. Pitcairn*, 325 U.S. 77, 78-79 (1945) (case is "commenced" for federal limitations purposes even if filed originally in state court lacking jurisdiction, at least if applicable state law permits transfer rather than requires initiation of new suit).

Keene would have had the opportunity to decide not to bring any other action and to pursue the Claims Court actions alone, or at least to drop the other actions and file new Claims Court actions long before almost a decade had elapsed since the filing of these cases.) Thus, if ever there were a case for equitable tolling to prevent the loss of rights by a party that vigilantly pressed them, this is it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD G. TARANTO
Counsel of Record

JOEL I. KLEIN

KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

JOHN H. KAZANJIAN
IRENE C. WARSHAUER

MARY BETH GORRIE
ANDERSON KILL OLICK &
OSHINSKY, P.C.
666 Third Avenue
New York, NY 10017

STUART E. RICKERSON
Vice President-General Counsel

JOHN G. O'BRIEN
Associate General Counsel
KEENE CORPORATION
200 Park Avenue
New York, NY 10166

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Supreme Court, U.S.

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In the Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

WILLIAM C. BRYSON

Acting Solicitor General

STUART M. GERSON

Assistant Attorney General

MAUREEN E. MAHONEY

Deputy Solicitor General

ROBERT A. LONG, JR.

Assistant to the Solicitor General

BARBARA C. BIDDLE

ROBERT M. LOEB

Attorneys

Department of Justice

Washington, D.C. 20530

(202) 514-2217

QUESTIONS PRESENTED

Under 28 U.S.C. 1500, the Court of Federal Claims lacks subject matter jurisdiction over "any claim for or in respect to which the plaintiff * * * has pending in any other court any suit or process against the United States" or its agents. The questions presented are:

1. Whether Section 1500 applies if a plaintiff is unable to pursue all its legal theories in a single action.

2. -Whether Section 1500 applies if the plaintiff simultaneously litigates a dispute in the Court of Federal Claims and another court, but terminates the other action before the Court of Federal Claims rules on a motion to dismiss for lack of jurisdiction.

3. Whether the decision in this case should apply to petitioner.

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REPLY BRIEF FOR PETITIONER

RICHARD G. TARANTO
Counsel of Record

JOEL I. KLEIN

KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

JOHN H. KAZANJIAN
IRENE C. WARSHAUER
MARY BETH GORRIE

ANDERSON KILL OLICK &
OSHINSKY, P.C.
666 Third Avenue
New York, NY 10017

STUART E. RICKERSON
Vice President-General Counsel
JOHN G. O'BRIEN
Associate General Counsel
KEENE CORPORATION
200 Park Avenue
New York, NY 10166

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for the Federal Circuit

REPLY BRIEF FOR PETITIONER

The Government's position is that Section 1500 automatically requires dismissal of a claim in the Court of Federal Claims if, at any time during the pendency of that claim, the plaintiff ever had pending elsewhere a "related" case against the Government or its agents (*i.e.*, a case growing out of the same facts). This is so, the Government contends, even though the "related" suit was on a distinct claim that by law *had* to be brought in a different forum, even though Congress nowhere required an election between "related" remedies, and even though the plaintiff can immediately refile its claim in the Court of Federal Claims once the "related" action is no longer pending. Gov't Br. 20-21. The Government must acknowledge, of course, that by the time the plaintiff can proceed in the Court of Federal Claims, some or all of the original claims in that court may have been lost, either as a practical matter (through sheer delay) or by operation of law (statutes of limitations). Gov't Br. 40-41,

43-44. The Government nevertheless reads Section 1500 as Congress's underhanded means of stripping litigants, through an inescapable delay requirement, of legal rights that it elsewhere expressly gave. *See* Pet. 24-28.

Nothing in the Government's brief, however, remotely demonstrates that Congress has actually made such an implausible choice. To the contrary, the acknowledged policy of Section 1500—the avoidance of improperly duplicative simultaneous litigation burdens on the Government (Gov't Br. 20-21)—is fully served under *our* view of Section 1500, through the Court of Federal Claims' obligation to stay its proceedings where necessary to avoid true duplication of suits. *See* Pet. Br. 41-42 (citing cases). What the Government really seeks from its construction of Section 1500, then, is the unavoidable forfeiture of congressionally granted legal rights against it—a “protection” that is inconsistent with other congressional directives. The Government's position thus would “impute to Congress a purpose to paralyze with one hand what it sought to promote with the other” (*Clark v. Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947)), a result that conflicts with the judicial duty of “reconciling many laws enacted over time, and getting them to ‘make sense’ in combination” (*United States v. Fausto*, 484 U.S. 439, 453 (1988)).

In these circumstances, only the most compelling case of unambiguous textual necessity could conceivably support adoption of the Government's position. But there plainly is no such case. Nothing in the Government's brief undermines our common-sense reading of the statute: (1) Section 1500 applies only if two cases against the Government would be improperly duplicative under *res judicata* law and so does *not* apply when Congress has mandated separate suits (Pet. Br. 18-32); and (2) Section 1500 in no event requires dismissal of an action *after* any other suit is no longer pending (Pet. Br. 33-42). Moreover, the contrary reading, which plainly would be both new and harsh, cannot justifiably be applied here to deprive Keene of its rights.

A. Section 1500 Covers Dual Suits Against the United States Only if They Involve the Same Claim Under the Law of Claim Preclusion.

In our view, a plaintiff has another case “for or in respect to” its claim in a Court of Federal Claims case only if the claims in the two cases are the same under the familiar body of law aimed at duplicative litigation—the law of *res judicata*. The Government responds that Section 1500 must be read to apply whenever the two claims are “related to,” *i.e.*, grow out of the same “operative facts” as, one another. Gov't Br. 14-16, 22. But the text does not compel that reading (Gov't Br. 14-16); the legislative history does not support it (Gov't Br. 17-21); and it plainly repudiates settled precedent and renders Section 1500 incompatible with other statutes (Gov't Br. 21-28, 39-41).¹

1. *Language.* The Government's assertion that “for or in respect to” unambiguously and plainly bears its proposed “related to”/“operative facts” meaning is simply insupportable.² The statement that a plaintiff has pend-

¹ The Government's intimation that our reading of Section 1500 is not properly presented (Gov't Br. 21 n.18) is frivolous. As the Government's own Brief in Opposition made explicit, the petition, *in addition to* seeking review of the “has pending” ruling below, squarely presented the question “[w]hether petitioner's actions against the United States involved the same claim for purposes of Section 1500.” Br. in Opp. at I. Our argument, far from “rais[ing] additional questions or chang[ing] the substance of the questions already presented” (Sup. Ct. R. 24.1(a)), directly answers that question. *See also* Sup. Ct. R. 14.1(a).

² The Government quotes this Court's observation in *Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924), with respect to Section 1500's predecessor, that “the words of the statute are plain, with nothing in the context to make their meaning doubtful.” Gov't Br. 14-15. But the statutory issue in *Corona* (whether the statute applied on appeal), as to which the statute *was* plain, has no bearing on the issue here. *See* Pet. Br. 38 n.23. Not even the Government contends, what would be preposterous, that a statute's lack of ambiguity on one issue somehow makes the statute unambiguous on all other issues.

ing a case "for or in respect to" a particular claim is quite naturally understood, as we suggest, to mean that the subject of the case is that very claim.³ This reading reflects a familiar usage, one that is found in particular in cases and other materials specifically concerned with *res judicata*.⁴ In fact, in the present context, this is a more natural meaning than the Government's notion that the case need only grow out of the same "operative facts" as, and thus be loosely "related to," the claim. Congress easily could have written Section 1500 to reach all claims growing out of, or arising from, the same subject matter or facts or transaction or dispute or controversy; but the statute is not written in any of those ways. Instead, Congress used a phrase that plainly must be read in its

³ See Webster's Third New International Dictionary of the English Language 1934 (1986) ("with reference to"); *The American Heritage Dictionary* 1040, 1052-53 (2d Coll. ed. 1982) ("with respect to," like "regarding" or "as regards," equivalent to "with reference to"; "reference"); B. Garner, *A Dictionary of Modern Legal Usage* 480 (1987) ("The phrases *in respect of* and *with respect to* are usually best replaced by simpler expressions, such as single prepositions. See *regard* and *as regards*"); *id.* at 469 (usually, the phrases "in regard to" or "with regard to" "may advantageously be replaced by some simpler phrase such as *concerning*, *regarding*, *considering*, or even the simple prepositions *in*, *about*, or *for*").

⁴ See, e.g., *G. & C. Merriam Co. v. Saalfeld*, 241 U.S. 22, 29 (1916) ("The doctrine of *res judicata* furnishes a rule for the decision of a subsequent case between the same parties or their privies respecting the same cause of action."); *Lesser v. Gray*, 236 U.S. 70, 75 (1915) ("judgment in respect of the claim"); *Forsyth v. City of Hammond*, 166 U.S. 506, 518 (1897) ("a decision . . . in respect to any essential fact or question in the one action is conclusive between the parties in all subsequent actions"); Restatement (Second) of Judgments § 17(3) (1982) (judgment is conclusive "with respect to any issue actually litigated and determined" if essential to the judgment). See also 28 U.S.C. § 1292(d)(2) (interlocutory appeal from Court of Federal Claims on legal question "with respect to which" well-grounded disagreement exists; analogue for district court, § 1292(b), says "as to which"); Sup. Ct. R. 10.2, 13.6, 14.1 (e)(ii), 20.3(a) ("in respect to" or "respecting" or "in respect of").

particular context and that can (and, here, does) bear the meaning we urge.⁵

Indeed, the Government's brief all but explicitly acknowledges that its case cannot rest on a plain or unambiguous meaning when, having transformed "in respect to" into "related to," it then states that its "operative facts" position "is consistent with this statutory language." Gov't Br. 22 (emphasis added). A claim of mere "consistency" is a confession that the text does not determine a single meaning. Beyond that, any plain meaning argument based on "for or in respect to" is contradicted by the utter novelty of the argument. Thus, in adopting this reading in *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1559-62 (1988), *cert. denied*, 489 U.S. 1066 (1989), the Federal Circuit not only never relied on the phrase but expressly found the statute "[l]acking a plain meaning" in this respect. *Id.* at 1560. Likewise, in opposing certiorari in *Johns-Manville*, the Government made no plain meaning argument based on "for or in respect to." 88-1052 Br. in Opp. 14-19. Nor did the Government make any such argument in opposing certiorari in the present case. Br. in Opp. 8-13. To the contrary, the Government repeatedly stated the question here as whether the several actions at issue "involved the same claim" (*id.* at I; see also *id.* at 9, 10) (empha-

⁵ Not only the phrase "in respect to" and its equivalents are common in statutes, but so are the phrases "for or in respect to" and "for or with respect to." E.g., 7 U.S.C. § 6a(2)(B); 12 U.S.C. §§ 95a(2), 632; 15 U.S.C. § 78kkk(b); 22 U.S.C. §§ 1631d, 4308(b); 26 U.S.C. 501(c)(21)(A)(i), 814(e)(1), 7206(4), 7301(a), 7341(a); 42 U.S.C. § 1395g(b); 46 U.S.C. § 1286. See also *Weber v. Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 67, 70 (1873); *United States v. Railroad Co.*, 84 U.S. (17 Wall.) 322, 325 (1872). Of course, legal language commonly employs such repetition for caution's sake, even if the terms barely differ in meaning. See B. Garner, *supra*, at 197-200; D. Mellinkoff, *The Language of the Law* 349-62 (1963); cf. *Dixson v. United States*, 465 U.S. 482 (1984) ("for or on behalf of," in 18 U.S.C. § 201(a)). Any "plain meaning" view that ignored context would presumably determine the meaning of these phrases wherever they were used.

sis added)—which not only contradicts the new “related to” reading but is precisely *our* reading of the statute, with the natural result that two claims against the Government are not the “same” for purposes of Section 1500 if they are not the “same” under the familiar body of law addressed to that problem (*res judicata* law).⁶

2. *Legislative History* The Government next argues that the 1868 legislative history of Section 1500’s predecessor “confirms that Congress intended to bar simultaneous litigation of a dispute in the Court of Federal Claims and another court.” Gov’t Br. 17. The statute, however, does not use the Government’s term “dispute,” but speaks of “claims.” And the 1868 legislative history neither does nor can support the Government’s position.

First, on its own terms, the 1868 history simply does not show that Congress was aiming at different “claims” (non-mutuality aside) arising out of the same “dispute.” To the contrary, Senator Edmunds, in discussing the statutory and common-law cotton claimants that were the sole object of his concern, treated the claims as the same, except for non-mutuality of the parties: he complained that the claimants had brought suit against federal officers and then brought “their claims” against the United States in the Court of Claims. *See* Pet. Br. 30-31; Gov’t Br. 18-19. As far as his remarks (and the original text) indicate, Senator Edmunds’ bill was designed to overcome only one limitation in *res judicata*’s

⁶ The Government suggests at one point (Gov’t Br. 22-23) that two claims are the “same” under *res judicata* law whenever they grow out of the same operative facts, even if jurisdictional rules mandate that the claims be brought separately. Gov’t Br. 22-23. This suggestion, aside from ignoring the *substance* of preclusion law, is wrong. Both the First and Second Restatements make clear that the “mandatory separation” rule forms part of the definition of “What Constitutes the Same Cause of Action” (Restatement of Judgments, ch. 3, Title D heading, at 239 (1942)). *See* Restatement (Second) of Judgments, Title D, Introductory Note, at 195 (“The Scope of ‘Claim’”).

definition of the “same cause of action”—that the parties to the proceedings had to be the same. *See Matson Navigation Co. v. United States*, 284 U.S. 352, 355-56 (1932).

The Government nevertheless asserts that the 1868 Congress *must* have contemplated coverage of claims deemed different under the law of *res judicata* (even assuming mutuality), because Congress must have viewed the statutory and common-law cotton claims as different in that sense. Gov’t Br. 24 & n.10. But the Government offers no support for that critical assertion; and the claim is, in fact, insupportable. Under the “same evidence” rule widely used at the time, the common-law cotton claims (conversion) *were* the same for purposes of *res judicata* as the statutory cotton claims (conversion plus loyalty), except for the non-identity of the defendants (the exception addressed by the statute).⁷ The Government does not even challenge the existence of the same evidence rule or its applicability to the cotton claims. *See* Gov’t Br. 24 n.10.⁸ Accordingly, there is simply nothing

⁷ The same evidence rule—that two claims against a party arising from one transaction were the same under *res judicata* if the same evidence would suffice to prove both claims—was a familiar one. *See, e.g., Chapman v. Smith*, 57 U.S. (16 How.) 114, 133 (1854); *Lawrence v. Vernon*, 15 F. Cas. 84 (C.C. D. Mass. 1837) (Story, Circuit Justice); *Spicer v. United States*, 5 Ct. Cl. 34, 52 (1869) (Casey, C.J., dissenting), *rev’d*, 82 U.S. 51 (1873); Restatement (Second) of Judgments § 24 comment a (discussing old *res judicata* principles). *See also* cases and sources cited at Pet. Br. 32.

⁸ The Government’s only effort to address this point (Br. 24 n.10) is to suggest that the law was “far from clear,” but its sole citation—a footnote in *Nevada v. United States*, 463 U.S. 110, 130 n.12 (1983)—does not help the Government’s argument. That footnote quoted an earlier decision that made clear that the same-evidence test was not a *necessary* condition for treating the claims as the same under *res judicata* law. The Government offers no authority to deny that the same-evidence test would have established a *sufficient* condition (mutuality aside) for treating the statutory and

to the Government's central contention that the cotton claims would be outside the statute under our reading—and, therefore, nothing to the Government's reliance on the 1868 legislative history.

Second, and in any event, as a matter of proper statutory construction, the 1868 legislative history could not control the Court's interpretation of Section 1500 today. As our opening brief explains, the Government's view of Section 1500 would mandate delays, for years, in litigants' gaining of access to the Court of Federal Claims to vindicate legal rights that Congress gave them, thus producing—both through the delays themselves and perhaps through statute-of-limitations bars as well—inevitable forfeitures of rights and forced elections between distinct remedies that Congress intended to be meaningfully available and to supplement one another. These results are not just “harsh,” as the Government says (Gov't Br. 39); they are clearly contrary to numerous statutes enacted since 1868, including the Tucker Act, the FTCA, the transfer statute (28 U.S.C. § 1631), and statutes of limitations. See Pet. Br. 25 & n.12. The proper judicial task is to read Section 1500 so that it comports with *today's* statutory landscape.⁹ Mere legislative history from 1868 cannot justify a construction of Section 1500, like the Government's, that would deeply undermine the *current* statutes with which Section 1500 necessarily interacts.¹⁰

common-law cotton claims as the same under *res judicata* law, which is the only relevant point here.

⁹ See *United States v. Fausto*, 484 U.S. at 453 (“The courts frequently . . . interpret a statutory text in the light of surrounding texts that happen to have been subsequently enacted. This classic judicial task of reconciling many laws enacted over time, and getting them to ‘make sense’ in combination, necessarily assumes that the implications of a statute may be altered by the implications of a later statute.”).

¹⁰ See *Patterson v. McLean Credit Union*, 491 U.S. 164, 181 (1989) (“We should be reluctant . . . to read an earlier statute

There are special reasons for following that familiar approach in this case. The statute at issue was enacted in 1948, *not* in 1868. Moreover, there is no evidence of a considered congressional judgment, even in 1868, about the general implications of the enactment for the litigation of claims against the Government. Cf. *Clark*, 332 U.S. at 488 (“We are dealing with hasty legislation which Congress did not stop to perfect as an integrated whole.”). Rather, the 40th Congress focused on only one problem, the cotton claims—which, by June 25, 1868, had almost all been filed already. See Captured and Abandoned Property Act of 1863, ch. 120, § 3, 12 Stat. 820 (claims had to be brought “within two years after the suppression of the rebellion”); *United States v. Anderson*, 76 U.S. (9 Wall.) 56, 70-71 (1869) (Aug. 20, 1866, was official date of “suppression”). In any event, no congressional judgment in 1868 could possibly reflect the radically different statutory landscape of today: the Tucker Act (1887), the FTCA (1946), and other statutes now broadly “‘give the people of the United States what every civilized nation of the world has already done—the right to go into the courts to seek redress against the Government for their grievances.’” *United States v. Mitchell*, 463 U.S. 206, 213-14 (1983). Mere legislative history from 1868, perhaps regardless of what it said, cannot warrant reading Section 1500 to circumvent those and other current statutes.

3. *Case Law and Consequences.* Although the Federal Circuit recognized that its ruling required the overruling of established precedent dating back to 1956 (Pet. App. A17 n.3, A22), the Government tries to avoid the force of *stare decisis* as a powerful support for our read-

broadly where the result is to circumvent the detailed remedial scheme constructed in a later statute.”); *Clark*, 332 U.S. at 488-89 (“Our task is to give all of [a statute]—1917 to 1941—the most harmonious, comprehensive meaning possible. . . . To do otherwise would be to impute to Congress a purpose to paralyze with one hand what it sought to promote with the other.”).

ing of Section 1500. Gov't Br. 25-28. But the Government explicitly acknowledges that its "related to"/"operative facts" interpretation of Section 1500 is inconsistent with settled precedent beginning with *Casman v. United States*, 135 Ct. Cl. 647 (1956). Gov't Br. 28. The Government's reading therefore *concededly* requires repudiation of more than a quarter century of precedent.

The Government asserts that *Casman* has been limited to cases involving claims for different types of relief (Gov't Br. 26-28), but even if true, the point would be irrelevant: the Government's reading of Section 1500, by its own admission, is incompatible with *Casman*. Anyway, the Government's assertion is false. As the Government reluctantly concedes, the Court of Claims—the appellate court whose decisions are precedent for the Federal Circuit—had clearly recognized the full meaning of the *rationale* of *Casman* (that two claims are not the same if they *must* be brought separately) and applied it beyond claims for different types of relief. Gov't Br. 27 n.12. And the Government's citations (*id.* at 25, 26-27) do not refer to a single case in which the Court of Claims (or Federal Circuit) *prior* to *Johns-Manville*—the decision announcing the "operative facts" rule we are challenging—held that the *Casman* construction of Section 1500 was "limited" to claims for "different relief."¹¹

¹¹ It is hardly surprising that cases *after Johns-Manville* would follow the logic of that decision. The only earlier appellate-court case the Government cites, *Pitt River Home & Agric. Coop. Assoc.*, 215 Ct. Cl. 959 (1977), contradicts rather than supports the Government's point. The court there found Section 1500 *not* to apply, explaining that Section 1500 applies only where "the same cause of action and claims for relief are asserted in the Court of Claims and other courts." 215 Ct. Cl. at 961 (emphasis added). (Even in the one pre-*Johns-Manville* decision of the trial court cited by the Government, *Hill v. United States*, 8 Cl. Ct. 382 (1985), the Section 1500 dismissal apparently could have rested on the ground that there is a single remedy for discrimination in employment by the federal government, see *Brown v. GSA*, 425 U.S. 820 (1976).)

In short, the Government's reading does reject decades of settled law.¹²

Turning from precedent, the Government argues that our reading would violate Section 1500's policy by subjecting the Government to duplicative litigation burdens. Gov't Br. 23-24, 39-40. This contention, however, begs the question of when Section 1500 deems two suits improperly duplicative: it *assumes*, but does not establish, that the separate litigation of distinct claims (which necessarily involve different issues and which Congress has demanded be brought separately) is improperly duplicative under Section 1500. In any event, the alleged consequence does not follow. The Government does not dispute that the Court of Federal Claims has the authority and is under a duty to stay its proceedings where necessary to coordinate them with other proceedings so as to avoid duplicative burdens. See Pet. Br. 41-42. That power and responsibility fully protect the Government's interest in avoiding duplicative burdens.

Finally, unlike the Federal Circuit, the Government tries to minimize the consequences of its reading of Section 1500: it points to the 6-year statute of limitations for claims under the Tucker Act and notes that in "cer-

¹² We note again that this law was settled—so that claimants against the United States were not being unfairly hindered by Section 1500—when Congress reenacted Section 1500 in 1982. See Pet. Br. 22-23. The Government observes that in 1992, after the decision below, Congress amended Section 1500 without adopting a proposal to repeal the provision. Gov't Br. 20 n.7, 25 n.11. But this sort of mere congressional failure to adopt a proposal cannot be accorded any significance. See, e.g., *Aaron v. SEC*, 446 U.S. 680, 694 n.11 (1980); *United States v. Wise*, 370 U.S. 405, 411 (1962). Nor does the timing of the 1992 amendment constitute a ratification of the Federal Circuit's *en banc* decision: that decision, which suddenly made Section 1500 so onerous, was anything but settled law at the time of the 1992 amendment; to the contrary, it presented a very live controversy, as this Court's subsequent grant of certiorari in the case shows.

tain specific" circumstances—involving federal employees or claims for no more than \$10,000—Section 1500 need not impair the vindication of rights granted by Congress. Gov't Br. 40 n.20. But the identified circumstances are avowedly narrow ones: with those few exceptions, as the *amici* in this case amply show, there is no escaping the fact that most claimants with overlapping tort, contract, and constitutional claims against the Government are forced to bring separate lawsuits (for either similar or different types of relief)—and would therefore be subject to the delays and forfeitures attending the Government's construction of Section 1500. Moreover, the 6-year limitations period in no way alleviates the burdens of sheer delay (on litigants' ability to vindicate their rights and the courts' ability to adjudicate them) caused by a rule that would mandate postponement of litigation in the Court of Federal Claims. In addition, of course, if equitable tolling is unavailable, limitations problems will in fact regularly arise, particularly in "the most complex and protracted cases"—like the present one. Gov't Br. 40. The unjust and inefficient consequences of the Government's reading cannot be discounted.

B. Section 1500 Does Not Require Dismissal when the Plaintiff Does Not Have Another Action Pending in Another Court.

The Government also defends the dismissal of Keene's claims by arguing that Section 1500 rigidly demands dismissal of an action in the Court of Federal Claims whenever the plaintiff had another ("related") action pending in another court at *any* time during the action in the Court of Federal Claims. Gov't Br. 29-36. That position is utterly insupportable as an interpretation of Section 1500; indeed, the Government hardly argues it. And that is so even if (as is also wrong but need not be decided here) dismissal is required *while* another action is pending.

1. *No Longer Pending.* To begin with, the language of Section 1500 squarely contradicts the proposed interpretation. The statutory language applies only when the plaintiff "*has pending*" certain actions in other courts. The Government itself all but concedes that the provision does not apply once any other suit is over: "By its terms, however, the statute applies only if the plaintiff '*has pending* any suit or process in any other court.' 15 Stat. 77 (emphasis added). The language of the statute thus does not preclude a second adjudication if the first action is no longer '*pending*.'" Gov't Br. 21.

Although the absence of textual support is reason enough to reject the Government's position, that position gains no further support if one looks beyond the statutory language. Notably, the pre-1948 statutory language used the same "*has pending*" language as the current provision. Pet. Br. 29 n.16; Gov't Br. 18 & 19 n.6. And the legislative history relied on by the Government—Senator Edmunds' statement in 1868—speaks of plaintiffs with dual suits "*now pending*" in the Court of Claims and in other courts. See Pet. Br. 30-31; Gov't Br. 18. Nor, finally, can the policy against simultaneous duplicative litigation possibly support dismissal of a case in the Court of Federal Claims when no other suit is pending.¹³

The Government's only "argument" is an assertion: "the fact that an action in another court has ended does not imply that the Court of Federal Claims had jurisdiction while the other action was pending." Gov't Br. 29. The simple answer to this statement is that, like the Fed-

¹³ The Government suggests that its construction would help it keep track of overlapping suits brought in different courts. Gov't Br. 31-32. But even if that were a proper consideration in interpreting the statute, it cannot support a distortion of Section 1500's plain language (or a construction that produces forfeitures of legal rights). Anyway, a simple discovery request made to the plaintiff early in the litigation (or a pleading requirement) can fully inform the Government of any other suits.

eral Circuit's assertion that "[a]ll jurisdictional rules are absolute" (Pet. App. A17), it wholly sidesteps the issue actually presented. The question here is not whether the Court of Federal Claims "*had* jurisdiction" earlier in the lawsuit: it is whether the case must be dismissed if there was ever a "jurisdictional defect," even though that "defect" no longer exists. But the Government offers no argument whatsoever in defense of that position. Indeed, the Government does not even fall back on an analogy to diversity jurisdiction's "time of filing" rule, and for good reason: the analogy is hardly compelling; the rule is far from text-based and far from rigid; and the rule is inconsistent with the Government's view that dismissal is required even if a district court action is filed *after* the commencement of the case in the Court of Federal Claims.¹⁴

The Government's position is, in any event, flatly inconsistent with this Court's precedent. This Court's decision in *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826 (1989), confirmed that a lack or loss of jurisdiction at some earlier stage of a lawsuit does *not* require dismissal after the jurisdictional defect is cured: diversity jurisdiction was lacking throughout the proceeding, but this Court held that the case should *not* be dismissed once diversity was present.¹⁵ *A fortiori*, the "jurisdiction"

¹⁴ The Government cannot rely on the time-of-filing rule borrowed from diversity jurisdiction without also accepting for Section 1500 the corollary that post-filing events do not destroy jurisdiction originally present (see *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 111 S. Ct. 858, 860 (1991))—which the Government cannot do while it disagrees with the rule of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966). Gov't Br. 36-38. It should be unnecessary for the Court to address the *Tecon* question in reversing the Federal Circuit's dismissal of Keene's claims.

¹⁵ The Government tries to distinguish *Newman-Green* by saying that Fed. R. Civ. P. 21 provided a "source of authority" for the ruling. Gov't Br. 33. But since the Federal Rules "shall not be construed to extend . . . the jurisdiction of the United States dis-

label cannot require dismissal under Section 1500, which is merely a timing provision affecting cases indisputably within the Tucker Act's grant of jurisdiction to the Court of Federal Claims.¹⁶

Finally, the Government's position is inconsistent with decades of settled lower court precedent—as the Government explicitly acknowledges. Gov't Br. 34 (*Brown v. United States*, 358 F.2d 1002 (Ct. Cl. 1966), is "inconsistent with" Government's reading of Section 1500). Although the Government contends that "the holding of *Brown* is more circumscribed than petitioner suggests" (Gov't Br. 34), the Government does not dispute that, prior to the decision below, it was settled law in the Court of Claims, the Federal Circuit, and the Claims Court that Section 1500 presented no bar to hearing a case *after* the "other" action in another court was no longer pending. See Pet. Br. 39. Thus, the Government's position not only is unsupported by the statutory lan-

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 strict courts" (Fed. R. Civ. P. 82), what the Court held was that the statutory jurisdictional rule was flexible enough to accommodate practical concerns reflected in Rules authorized by Congress. Here, there are more than practical concerns and more than Federal Rules: the "jurisdictional" rule of Section 1500 is necessarily flexible enough to ensure that the *rights* granted in other *statutes* are not impaired. See also Fed. R. Civ. P. (Claims Ct. R.) 1 (policy to "secure the just, speedy, and inexpensive determination of every action").

¹⁶ The Government does not deny that both statutes of limitations and exhaustion provisions—timing rules—have been viewed as defining the courts' "jurisdiction," yet have been treated flexibly to avoid the loss of rights. See *Irwin v. Veterans Admin.*, 111 S. Ct. 453, 457 (1990); *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975). The Government's footnote on those cases (Gov't Br. 33 n.15) merely confirms our point: not all "jurisdictional" restrictions are of a piece. Indeed, this Court has openly followed a practical approach to more purely jurisdictional statutes such as 28 U.S.C. §§ 1257 and 1291. See Pet. Br. 36 n.20; *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 201-02 (1988). See also *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 351-53 (1988) (court may remand removed pendent state-law claim to prevent "injustice" of expired limitations period and "expense" of new filing).

guage, history, and policy but requires repudiation of settled statutory precedent in defiance of the doctrine of *stare decisis*. See also note 12, *supra*.

2. *While Pending*. Although the issue need not be reached, even the premise of the Government's argument—that Section 1500 rigidly requires permanent dismissal *while* another action is pending—is incorrect. The text alone will not compel such a reading: “jurisdiction” in Section 1500 is properly read to mean “jurisdiction to render judgment” or “jurisdiction to adjudicate,”¹⁷ so that dismissal of the case would not be required—a stay of proceedings would undoubtedly satisfy the statute. Moreover, that was the settled law prior to the decision in this case, under the precedent just discussed. Further, dismissal is not required to serve the statutory policy of avoiding duplicative litigation burdens: suspension will fully serve that goal. Finally, particularly (though not only) if the Government's “related to” position were adopted, a dismissal rule would undermine other congressional policies.¹⁸

¹⁷ See Pet. Br. 34 (citing language of provisions surrounding 28 U.S.C. § 1500); Gov't Br. 21 (Section 1500 “does not preclude a second *adjudication* if the first action is no longer ‘pending’”) (emphasis added). Contrary to the Government's suggestion (Gov't Br. 30 n.14), the varying expressions in the statutory provisions surrounding Section 1500 are properly viewed as equivalent in meaning, not as reflecting fine-tuned differences in meaning.

¹⁸ The Government cites *Hallstrom v. Tillamook County*, 493 U.S. 20, 26-31 (1989), but that decision is consistent with our position here. Gov't Br. 33. The decision there rested on the explicit statutory language (“no action may be commenced”), the considered policy adopted by Congress that required the dismissal rule, and the ability of plaintiffs to protect their rights even with such a rule. 493 U.S. at 27-32. The same cannot be said of Section 1500, whose text is different, whose policy does not require automatic dismissal, and whose application would unavoidably result in loss of rights if a dismissal rule were adopted. In similar circumstances, dismissal has not been required. See *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385 (1982); *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 764-65 (1979); *Love v. Pullman Co.*, 404 U.S. 522 (1972).

The Government's rigid dismissal position, in fact, is inconsistent not only with settled lower court precedent but with this Court's holding in *Pennsylvania R.R. v. United States*, 363 U.S. 202 (1960). The Court there reversed a dismissal by the Court of Claims and, fully aware of the Section 1500 issue in the case, ordered that the case merely be suspended until completion of still-pending district court proceedings involving the same issues and dispute (in the Government's terms, “related” litigation). 363 U.S. at 203-04. The significance of that holding is confirmed, not weakened, by the fact that the Court did not expressly rule on (or the Government raise) the Section 1500 issue: the reason, plainly, was that Section 1500 was not understood to be the sort of “jurisdictional” provision that requires dismissal or that “cannot be waived by the parties or the court,” as the Government now suggests. Gov't Br. 32. The Court's holding in *Pennsylvania R.R.* thus stands contrary to the Government's current rigid and absolute jurisdictional view of Section 1500.

C. The Federal Circuit's Interpretation of Section 1500, Even if Adopted, Should Not Defeat Keene's Claims.

Even if the Federal Circuit's reading of Section 1500 is found correct, it should not be applied to bar Keene's claims—for reasons of prospectivity and of equitable estoppel. Government's contrary position is unpersuasive.

1. *Prospectivity*. Although the Government says that prospectivity is never proper for jurisdictional rulings (Gov't Br. 41), it does not deny that this Court in fact held a decision that denied jurisdiction to be prospective in *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982). See Gov't Br. 41 n.21. Moreover, the Government's two precedents rejecting a prospectivity argument in a jurisdictional context (Gov't Br. 41-42, citing *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-80 (1981)) are materially

different from the present case: the statutory rulings in those cases (which in any event did not overthrow settled precedent) meant that the cases were wholly outside any grant of jurisdiction to the courts, which therefore could not reach the merits; the present case involves only a timing restriction on the hearing of a case that concededly has always been within the grant of jurisdiction under the Tucker Act and that today plainly may be heard on the merits.¹⁹ Further, the Government's general qualms about prospectivity (Gov't Br. 42-43) do not apply where, as here, the Court has power over the remedy as well as the choice of law. See Pet. Br. 43.

Prospectivity doctrine being available in this case, its application is clear. It cannot be seriously suggested that the decision below, which candidly overruled numerous settled precedents, did not "break[] any new legal ground." Gov't Br. 43. And there can be no clearer case of unfair surprise, and loss of rights pursued in good faith (the consequence if equitable tolling is unavailable), than the present.

2. *Equitable Tolling.* Once it is accepted that equitable tolling "may be available in some circumstances" (Gov't Br. 41, 44), it is clear that it should be available here. First, the issue is properly presented as part of the statutory analysis. As the Government itself recognizes, the availability of equitable tolling is intertwined with an evaluation of the consequences, and hence validity, of its reading of the statute. See Gov't Br. 41. In any event, in this decade-long litigation, this Court surely has discretion to avoid further delay in reaching the merits by speaking to the proper remedy—*e.g.*, a supple-

¹⁹ The Government misses the point when it says that in *Firestone* and *Budinich* there was diversity jurisdiction and so "the court had jurisdiction to decide that 'type' of case." Gov't Br. 42. It was the jurisdiction of the court of appeals that was at issue in those cases, and found wholly lacking (*i.e.*, outside any statute granting jurisdiction to the court of appeals); the district court's jurisdiction (under 28 U.S.C. § 1332) was irrelevant.

mental complaint making dismissal inappropriate, a new filing that reaches back to the commencement of Keene's suits in 1979 and 1981—if the radical change of law announced by the *en banc* Federal Circuit is approved.

Second, on the merits, equitable tolling is plainly proper under *Irwin v. Veterans Admin.*, 111 S. Ct. 453 (1990), to avoid a patent "injustice." *Carnegie-Mellon*, 484 U.S. at 352. Keene did everything possible to pursue its remedies against the Government not only "actively" (111 S. Ct. at 457-58) but expeditiously and efficiently: instead of filing thousands of separate third-party claims, it attempted to streamline the litigation by consolidating its tort claims in district court and its Tucker Act claims in the Court of Claims—separately, of course, because Congress has so required. See Pet. Br. 7 (Keene voluntarily dismissed *Miller* action for consolidation purposes). Moreover, although it is *not* necessary for equitable tolling that the Government have "induced or tricked" Keene into allowing the statute of limitations to pass (*ibid.*), this case in fact involves conduct of that order: the Government initially filed a Section 1500 motion in 1980, then withdrew the motion for "'tactical reasons'" (see Pet. Br. 5), and did not raise the issue, or seek the overturning of established precedent, until prompted by the Claims Court in 1987. By that time, of course, Keene had lost the opportunity to make any necessary election of remedies and to file new actions in the Claims Court without having lost the years of claims that are now at risk absent equitable tolling.

CONCLUSION

For the foregoing reasons, and for the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

RICHARD G. TARANTO
Counsel of Record

JOEL I. KLEIN
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

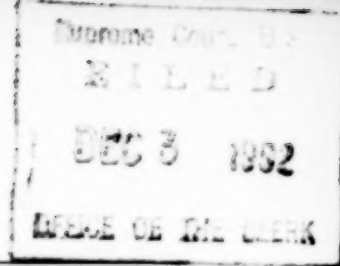
JOHN H. KAZANJIAN
IRENE C. WARSHAUER
MARY BETH GORRIE
ANDERSON KILL OLICK &
OSHINSKY, P.C.
666 Third Avenue
New York, NY 10017

STUART E. RICKERSON
Vice President-General Counsel

JOHN G. O'BRIEN
Associate General Counsel
KEENE CORPORATION
200 Park Avenue
New York, NY 10166

Dated: February 17, 1993

No. 92-166



In The
Supreme Court of the United States
October Term, 1992

— ♦ —
KEENE CORPORATION,

Petitioner,

vs.

THE UNITED STATES,

Respondent.

— ♦ —
**On Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit**
— ♦ —

**BRIEF OF THE STATE OF HAWAII AS
AMICUS CURIAE IN SUPPORT OF PETITIONER**
— ♦ —

ROBERT A. MARKS
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
Deputy Attorney General
State of Hawaii
*Counsel of Record

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365

*Counsel for the
State of Hawaii*

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BRIEF OF THE STATE OF HAWAII AS
AMICUS CURIAE IN SUPPORT OF PETITIONER

I. INTEREST OF THE AMICUS CURIAE.

The State of Hawaii has a deep and abiding interest in the proper functioning of the jurisdictional grants and judge-made rules which permit suits against the United States and its officers for wrongful actions by the Government. Presently, the State of Hawaii is evaluating a number of very large claims it has against the United States, ranging in possible valuation of up to the hundreds of millions of dollars or more, for actions by the Government which have deprived the people of Hawaii of assets transferred to them by the Congress, and wrongfully used by the United States, including but not limited

to claims pertaining to the Government's wrongful assertion of title over and takings with respect to lands set aside under the Hawaiian Homes Commission Act of 1920, 42 Stat. 108 (1921). See, e.g., *State of Hawaii ex rel. Attorney General v. United States*, 866 F.2d 313 (9th Cir. 1989). The decision of the Federal Circuit, sitting *en banc*, in *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992), poses a grave threat to these interests, as it does to the interests of all parties, including States, who have claims against the United States or its officers. By rigidly enforcing 28 U.S.C. § 1500 (1988) as an election clause, the Federal Circuit has threatened to arbitrarily terminate large numbers of claims against the Government based on factors, such as court delays and docket congestion over which litigants have no control whatsoever, in a manner that renders the entire corpus of federal jurisdiction-conferring statutes and doctrines amenable to substantial constitutional attack. In so doing, Hawaii believes, the Federal Circuit has overlooked a central tenet of statutory interpretation – that which mandates reading a federal law to avoid a substantial constitutional question. In contrast to the judgment of the *en banc* Federal Circuit, Hawaii submits that § 1500 should be read to permit the equitable tolling of claims that could be filed in the Claims Court during such time as a litigant against the Government is pursuing non-Claims Court remedies. Under this construction, litigants against the government would of course be subject to all the rules of res judicata and collateral estoppel, and a judgment on the merits of a non-Claims Court claim would generally operate to preclude any Claims Court suit on the same subject matter. However, where, as is often the case, the

non-Claims Court forum turns out to be without jurisdiction, the rule Hawaii urges would allow the Claims Court suit to proceed. This result, further, is consistent with the rule in *Casman v. United States*, 135 Ct. Cl. 647 (1956), which was overruled by the Federal Circuit in the opinion and judgment under review.

ARGUMENT

In Construing 28 U.S.C. § 1500 Rigidly, the Federal Circuit Has Infected the Entire Jurisdictional Scheme for Suits Against the Government with Substantial Constitutional Doubt; To Alleviate this Doubt, the Court Should Interpret § 1500 So as to Permit Exhaustion of Non-Claims Court Remedies Without Forfeiture of Claims under the Tucker Act.

The decision of the Federal Circuit in this case has two significant effects on litigants against the Government. Those litigants with plausible claims both in the Claims Court and in other federal fora must, if a Claims Court suit is filed first, be sure that that suit is pressed to conclusion and any jurisdictional bar uncovered prior to the running of any statute of limitations upon non-Claims Court claims. Conversely, such litigants who file first in District Court must be sure that such a suit is pressed to conclusion or determination of a jurisdictional bar before the running of the limitations period in the Claims Court. The central feature of the rule of decision as announced by the Federal Circuit, of course, is the fact that claims in the Claims Court or the District Court will be subject to forfeiture not necessarily on the basis of any action of the

litigant, but on the basis of factors wholly beyond that litigant's control, including court congestion, or, as not-too-uncommonly occurs, delay by the Government in raising jurisdictional matters. See Fed. R. Civ. P. 12(h)(3). These wholly random forfeitures plainly run afoul of the teachings of this Court in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982); at the very least, they raise a substantial constitutional issue that warrants reading § 1500 less rigidly than the court below. Indeed, whether or not the *Logan* defect in the Federal Circuit's reading of § 1500 was raised below, the notion that federal laws will not be read to inject a substantial federal constitutional doubt into them is "beyond debate." *DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). This Court, in light of the irrational manner in which the Federal Circuit's view of § 1500 operates, should reject that interpretation in favor of one which still pays heed to the statutory language, but yet avoids the constitutional issue.

The most consistent and readily available method of doing so is to rely on the generous notion of "equitable tolling" that Chief Judge Nies adopted in her concurring opinion. See Pet. App. A-27 (Nies, C.J., concurring, citing *Irwin v. Veterans Admn.*, 111 S. Ct. 453 (1990)). By tolling the statutes of limitation during such periods as non-Claims Court suits are pending, the Court would preclude both the simultaneous suits which the Government protests were the target of § 1500, and the random lapsing of claims for reasons over which litigants have no control. Alternatively, the Court can, and should, adopt the "claim-limiting" approach in *Casman v. United States*, 135 Ct. Cl. 647 (1956), which was the law for nearly four

decades before the precipitous action of the Federal Circuit below.

Contrary to the Federal Circuit's reasoning, the ruling below is not compelled by the statutory language. Indeed, given the elimination of the "No person shall file or prosecute" language from the 1948 revision of the statutes at large, the ruling is directly contrary to the language of § 1500, read in context of its history and purpose. See Pet. App. A-6 - A-10. That purpose plainly was to prohibit litigants from prosecuting the merits of two identical or substantially related lawsuits against the Government at the same time. But the notion that a federal court may not *decide* a federal claim which a litigant has a right to *file* is not unheard of in the law. See *Deakins v. Monaghan*, 488 U.S. 193 (1988) (claims for damages in suits otherwise barred by *Younger v. Harris*, 401 U.S. 37 (1971), are to be stayed, not dismissed, to avoid irrational running of the statutes of limitation). A rule of equitable tolling, or, as in *Deakins*, one which reads the term "jurisdiction" as relating to the power to decide the merits (not the power to accept a filing), gives 28 U.S.C. § 1500 all of the weight it deserves.



CONCLUSION

The judgment of the Federal Circuit should be reversed or vacated and remanded in accordance with the foregoing arguments.

Dated: Honolulu, Hawaii, December 3, 1992.

Respectfully submitted,

ROBERT A. MARKS
Attorney General
State of Hawaii

STEVEN S. MICHAELS*
Deputy Attorney General
State of Hawaii
*Counsel of Record

425 Queen Street
Honolulu, Hawaii 96813
(808) 586-1365

*Counsel for the
State of Hawaii*

No. 92-166

In the
Supreme Court of the United States
October Term, 1992

KEENE CORPORATION,
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v.
THE UNITED STATES,
Respondent.

On Writ of Certiorari to the
Court of Appeals for the Federal Circuit

**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION AND STANLEY C. AND
ROSALIE A. RYBACHEK IN SUPPORT OF
PETITIONER KEENE CORPORATION**

RONALD A. ZUMBRUN
JAMES S. BURLING
*R. S. RADFORD
*Counsel of Record
Pacific Legal Foundation
2700 Gateway Oaks Drive, Suite 200
Sacramento, California 95833
Telephone: (916) 641-8888
*Attorneys for Amici Curiae,
Pacific Legal Foundation
and Stanley C. and
Rosalie A. Rybachek*

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**BRIEF AMICUS CURIAE OF PACIFIC LEGAL
FOUNDATION AND STANLEY C. AND
ROSALIE A. RYBACHEK IN SUPPORT OF
PETITIONER KEENE CORPORATION**
—◆—

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) and Stanley C. and Rosalie A. Rybachek respectfully submit this brief amicus curiae in support of petitioner Keene Corporation. Written consent to the filing of this brief has been granted by counsel for all parties.

Copies of the letters of consent have been lodged with the Clerk of this Court.

INTEREST OF AMICI

Pacific Legal Foundation is a nonprofit corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. Policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only when the Foundation's position has broad support within the general community. PLF's Board has authorized PLF participation as amicus curiae in this matter.

PLF has participated in a number of landmark cases coming before this Court. Its attorneys were counsel of record in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and *Keller v. State Bar*, 496 U.S. 1 (1990). PLF filed amicus briefs with this Court in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987); *Hodel v. Irving*, 481 U.S. 704 (1987); *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), *Yee v. City of Escondido*, 503 U.S. ___, 118 L. Ed. 2d 153 (1992), and *Lucas v. South Carolina Coastal Council*, 505 U.S. ___, 120 L. Ed. 2d 798 (1992). It is believed that PLF's public policy perspective and broad litigation experience in support of private property rights will provide a helpful additional viewpoint on the procedural issues presented in the case at bar. Furthermore, PLF has filed friend of the court briefs in two "takings" lawsuits before the Federal Circuit Court of Appeals,

Whitney Benefits v. United States, 926 F.2d 1169 (Fed. Cir.), cert. denied, 116 L. Ed. 2d 354 (1991), and *Loveladies Harbor v. United States*, 21 Cl. Ct. 153 (1990), appeal pending, Federal Circuit Court of Appeals. Motions to dismiss are pending in both *Whitney Benefits* and *Loveladies* based upon the decision below in *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992) (*UNR Industries*).¹

Stanley C. and Rosalie A. Rybachek are a husband and wife team of placer gold miners who live in North Pole, Alaska. Over the past decade an increasing burden of federal regulations imposed primarily by the Environmental Protection Agency (EPA) has made it impossible for the Rybacheks to profitably mine their patented and unpatented mining claims near Livengood, Alaska.

After failing to achieve any significant measure of success in administrative and legal challenges to the regulations, the Rybacheks in 1989 filed suit in the United States Claims Court, Case No. 379-89L, wherein they alleged that the regulations had gone so far as to comprise a regulatory taking of their mining claims. The Rybacheks overcame an initial motion to dismiss based on substantive and procedural grounds. See *Rybachek v. United States*, 23 Cl. Ct. 222 (1991). However, on June 12, 1992, the United States filed a new motion to dismiss based upon *UNR Industries* which is currently pending before the Claims Court. Therefore, the outcome of the case at bar is of vital importance to the Rybacheks and their ability to pursue their takings claim.

¹ *UNR Industries* and the consolidated *Keene Corporation* case, for which certiorari was granted, will both be referred to as *UNR Industries* below.

The opinion below creates an unnecessary and inequitable procedural bar to property owners who are pursuing rightful claims for damages against the government. This ruling overturns a well-established body of case law which litigators had justifiably relied upon in pursuing their remedies for violations of their constitutional rights. The harsh procedural bar created by this opinion will negate years of conscientious effort by property owners to obtain relief under well-established procedures and will in some cases deprive them of remedies already granted. It will leave many innocent citizens with no recourse against governmental depredations in violation of rights supposedly guaranteed by the Fifth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Petitioner Keene Corporation (Keene) is currently a defendant in approximately 87,000 personal injury suits arising from exposure to asbestos.

In June of 1979, Keene filed a third-party complaint against the government, in the United States District Court for the Western District of Pennsylvania, relating to a personal injury claim asserted against Keene.

In December of 1979, Keene filed a petition against the government in the United States Court of Claims (*Keene I*) seeking indemnification and contribution for thousands of personal injury claims brought against Keene by shipyard workers.

In January, 1980, Keene filed an action against the government in the United States District Court for the Southern District of New York raising claims under the Federal Tort Claims Act (FTCA).

In April, 1980, Keene voluntarily dismissed the third-party action in Pennsylvania District Court noting that the Court of Claims proceedings in *Keene I* would satisfactorily resolve the matter.

On September 25, 1981, Keene brought a second petition against the government in the Court of Claims (*Keene II*) asserting that certain recoupments of moneys under the Federal Employees' Compensation Act comprised an unconstitutional taking of Keene's property without compensation.

On September 30, 1981, the FTCA action in New York District Court was dismissed for lack of subject matter jurisdiction. *Keene Corp. v. United States*, No. 80-CIV-0401 (S.D.N.Y.), *aff'd*, 700 F.2d 836 (2d Cir.), *cert. denied*, 464 U.S. 864 (1983).

In November of 1988, the United States moved for summary judgment in both *Keene I* and *Keene II*, asserting that the Claims Court lacked subject matter jurisdiction under 28 U.S.C. § 1500. This motion was granted on the grounds that Keene had identical claims pending in another forum at the time each petition was filed with the Claims Court. The third-party action in Pennsylvania District Court was held to deprive the court of jurisdiction over *Keene I*, while the FTCA action in New York District Court had the same effect on *Keene II*. *Keene Corp. v. United States*, 17 Cl. Ct. 146 (1989).

On consolidated appeal, the Federal Circuit reversed as to Keene. The panel majority concluded that the text of

28 U.S.C. § 1500 gave no firm criterion as to *when* a claim must be pending in another forum to deprive the Claims Court of jurisdiction. The appellate court concluded that jurisdiction exists if an identical District Court action is dismissed before the Claims Court "entertains and acts" on a motion to dismiss under 28 U.S.C. § 1500. *UNR Industries, Inc. v. United States*, 911 F.2d 654, 655 (Fed. Cir. 1990).

On rehearing *en banc*, the Federal Circuit vacated the panel decision and affirmed the original Claims Court ruling. The new Federal Circuit opinion holds that 28 U.S.C. § 1500 defeats jurisdiction if the same case is pending in another court at the time a claim is filed in the Claims Court *or* if the same action is brought in another court after the Claims Court filing. To reach this radical reinterpretation of Section 1500, the Federal Circuit was forced to overturn a long line of case precedent which advanced an alternative interpretation of the statute that was both more reasonable and more in keeping with the evident function and intent of the statute.

A petition for writ of certiorari was lodged with this Court and was granted on October 19, 1992.

SUMMARY OF ARGUMENT

The Federal Circuit has crafted a radical reinterpretation of 28 U.S.C. § 1500 that conflicts with the language, meaning, and purpose of the statute. The decision below gratuitously overturns a long line of settled precedent that reflects a more reasonable interpretation of Section 1500. Unless it is reversed by this Court, the decision below will

have a devastating and inequitable impact on a broad range of litigants conscientiously pursuing their rightful claims against the government.

The purpose of Section 1500 has always been to spare the government the expense of defending against the same claim twice. Originally, this goal was advanced by barring claimants from litigating against an agent or officer of the government in District Court and subsequently suing the government itself in the Court of Claims. With the passage of time, Section 1500 became more useful as a bar against simultaneous litigation of a single claim against the government in more than one forum. The statute was amended in 1948 to reflect this shift in emphasis. Among other changes, the 1948 amendments deleted any reference to the filing of a claim as a significant event for purposes of applying Section 1500. Instead, the modern language simply denies jurisdiction to the Claims Court if the same action is being simultaneously prosecuted against the government in another forum.

In the decision below, the Federal Circuit reaches back to the pre-1948 version of the statute and resurrects the time of filing as the key criterion for determining whether the Claims Court has subject matter jurisdiction over a claim. According to the court below, claimants are barred from pursuing their cases in the Claims Court if a substantially identical claim was before another court at the time of filing, regardless of whether the claim is fully litigated in the other forum and regardless even of whether the other forum has subject matter jurisdiction over the claim.

This radical reinterpretation of Section 1500 conflicts with more than 40 years of settled case law that has been relied upon by a broad range of litigants in pursuing their lawful remedies against the government. The court below

brusquely sweeps aside this stable body of precedent which was based on a more reasonable interpretation of the modern language of Section 1500. This haughty disregard of sound, established case law will have a devastating effect on litigants who have pursued legitimate claims against the government in reliance on settled procedures that have now been abruptly overturned. Moreover, by lightly overruling 40 years of precedent, the Federal Circuit contravenes basic principles of stable authority, judicial economy, and settled expectations that lie at the heart of the Anglo-American legal tradition.

The decision below will have disastrous and unjust consequences for a broad spectrum of litigants including many individuals seeking compensation from the government for unconstitutional takings of their private property. The Federal Circuit's ruling has been seized upon by government attorneys as a weapon to deprive innocent citizens of any opportunity to pursue their legal remedies against the United States. The new interpretation of Section 1500 by the court below has prompted motions to dismiss in several recent landmark takings cases as well as in the pending regulatory takings claim brought by amici Stanley C. and Rosalie A. Rybachek.

Unless this Court reverses, the decision below will work widespread hardship and injustice and deprive many injured parties of their day in court. This result is wholly inconsistent with the spirit and intent of Section 1500.

ARGUMENT

I

THE OPINION BELOW COMPRISES A RADICAL REINTERPRETATION OF 28 U.S.C. § 1500 THAT IS INCONSISTENT WITH THE PURPOSE AND FUNCTION OF THE STATUTE

The statute at issue in this case, now codified at 28 U.S.C. § 1500, provides that

[t]he United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500.

In the opinion below, the Federal Circuit asserts that its new interpretation rests on the "plain language" of Section 1500. *UNR Industries*, 962 F.2d at 1021. However, as noted in the dissenting opinion below, the statute is completely silent on the crucial point of *when* an action must be pending in another court to defeat jurisdiction in the Claims Court. *Id.* at 1026 (Plager, C.J., dissenting). Rather than addressing the language of Section 1500 as it exists today, the *en banc* ruling reaches back to a predecessor statute which focused on the existence of a duplicate claim *at the time of filing* with the Court of Claims. This emphasis was appropriate to the policy objectives of the statute in the

mid-Nineteenth Century. However, the subsequent deletion of any reference to the time of filing reflects an important shift in the procedural environment over the past century. By gratuitously resurrecting the Nineteenth Century criterion of the time of filing and injecting it into the modern statute, the Federal Circuit has created a harsh and inequitable rule that does not advance the policy interests underlying Section 1500.

Title 28, United States Code, § 1500, evolved from a reconstruction-era enactment intended to bar plaintiffs from filing actions against the government in the Court of Claims if they had failed to prevail against an officer or agent of the government in another court. As stated by the rule's sponsor, the objective was to prevent claimants from prosecuting an action in the Court of Claims *after* they "put the Government to the expense of beating them once in a court of law." *UNR Industries*, 962 F.2d at 1018. In other words, the measure was designed to bar *successive* litigation of the same complaint against the government in two different courts.

A rule barring such sequential litigation was necessary because a rash of such claims had been filed in the wake of the Civil War, and "[a]t that time a judgment in another court had no res judicata effect in a subsequent suit against the United States in the Court of Claims." *Connecticut Department of Children and Youth Services v. United States*, 16 Cl. Ct. 102, 104 (1989) (citation omitted).

The original circumstances giving rise to Section 1500 have long since faded to insignificance. Accordingly, amendments adopted in 1948 deleted any reference to the time of filing and broadened the statute to include cases where the government was the named defendant in both courts. Such cases (including the case at bar) are now

far more common than those that proceed against an agent or officer of the government in one court and against the government itself in another.

The changes in statutory language reflected (and facilitated) a fundamental change in the manner of application of Section 1500. Originally, the point of the statute was to bar *sequential* litigation of duplicate claims. By the time of the 1948 amendments, however, the emphasis had shifted to prohibiting *simultaneous* litigation of the same claim in two courts. This shift in emphasis reflects the simple reality that cases against the United States which are fully litigated in District Court are *already* barred from being relitigated in the Claims Court by the doctrine of res judicata. Although the original bar against sequential litigation serves little purpose today, the modern prohibition against *simultaneous* prosecution of claims against the government in different courts promotes the original goal of Section 1500--economizing the governmental resources required to defend against these cases.

The opinion below disrupts the smooth functioning of Section 1500 by resurrecting an emphasis on the time of filing that is wholly inappropriate to the modern language and purpose of the statute. The new standards fashioned by the Federal Circuit wrench the focus of Section 1500 away from the contemporary problem of *simultaneous* litigation and return to the Nineteenth Century objective of barring duplicate *sequential* claims--even though the vast majority of such claims are now barred by the doctrine of res judicata. Rather than a useful tool for legitimately economizing resources, Section 1500 will become entirely an engine of inequity, denying aggrieved parties their rightful day in court.

The purpose of Section 1500 was and remains to ensure that any plaintiff's claim against the United States arising from a given body of facts will be fully litigated once and only once--either in the Claims Court or elsewhere. Until now, however, plaintiffs have been assured of an opportunity to litigate their claims in *some* forum.

The opinion below establishes a needlessly harsh rule that is completely unnecessary to secure the government's legitimate objective of economizing resources. Even worse, it will have the effect of foreclosing some claimants from any opportunity to pursue meritorious actions against the government. This radical reinterpretation of Section 1500 represents a move *away from* the purpose and intent of the statute and cannot be justified under any rational theory of statutory construction.

II

THE OPINION BELOW ARBITRARILY BREAKS WITH WELL-ESTABLISHED PRECEDENT ASSIGNING A MORE REASONABLE INTERPRETATION TO SECTION 1500

The radical reinterpretation of Section 1500 by the court below overturns a well-established body of precedent. These cases had established an interpretation of Section 1500 fully consistent with the purpose and function of the statute. This line of authority had provided seemingly reliable guidance to petitioner and other litigants regarding the procedural requirements for pursuing their claims. The repudiation of this established body of law by the court below undermines the principles of stable authority, judicial economy, and settled expectations that are essential to the very concept of law.

Over the past four decades, the Claims Court has consistently held that the purpose of Section 1500 is to economize governmental resources by barring claimants from litigating the same case against the United States in two courts simultaneously. *See, e.g., Connecticut Department of Children and Youth Services v. United States*, 16 Cl. Ct. at 104. The opinion below overturns this entire body of authority by establishing a radical new bar to Claims Court jurisdiction over cases that may be filed (but not fully litigated) in another court in either the past or future.

In *Brown v. United States*, 358 F.2d 1002 (Cl. Ct. 1966), the Court of Claims considered the applicability of Section 1500 to a plaintiff in a procedural posture not unlike that of the petitioner in the case at bar. The claimant in *Brown* had petitioned the Court of Claims while the same action was pending in District Court, and indeed the government's Section 1500 motion to dismiss was granted. However, when the District Court subsequently dismissed for lack of subject matter jurisdiction, the Court of Claims granted a rehearing and denied the government's Section 1500 motion. Noting that the District Court action was no longer pending, the Court of Claims declined to apply Section 1500 in such a way as to "deprive the plaintiffs of the only forum they have in which to test their demand for just compensation." *Id.* at 1004. In overruling *Brown*, the Court below callously shrugs off the obvious inequities that its ruling will impose on claimants in such a position. *UNR Industries*, 962 F.2d at 1022.

To hold that Section 1500 mandates dismissal if an identical claim is brought elsewhere *subsequent* to filing in the Claims Court, the court below was forced to expressly repudiate the precedent of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966). The court below speculates that the

interpretation of Section 1500 set forth in *Tecon* may have been influenced by the underlying facts of the case. *UNR Industries*, 962 F.2d at 1020. One cannot help but wonder whether the same influences induced the Federal Circuit to overturn *Tecon* and the other cases cited here. Asbestos manufacturers are not the poster children of American industry. The number of personal injury cases that have been filed against these firms, and the total amount of potential damage awards, are astronomical. Rather than deal with the many complex and recurring questions of indemnification, contribution, and related issues involving the asbestos companies, the court below has fashioned an escape hatch by which the government can simply walk away and leave these relatively unsympathetic plaintiffs to pay the piper.

This Court must not allow the Federal Circuit to engage in a wholesale upheaval of established case law merely to fashion an easy exit from an unsavory morass of litigation.

III

THE OPINION BELOW WILL HAVE DEVASTATING AND INEQUITABLE CONSEQUENCES REACHING FAR BEYOND ITS EFFECT ON PETITIONER AND SIMILARLY SITUATED PLAINTIFFS

Already, the legacy of *UNR Industries* is reaching beyond asbestos liability litigation and is affecting a significant number of cases involving regulatory takings. In recent years federal regulation has had an increasing, and often devastating, impact upon the owners of private property. In some instances, redress has been available in Claims Court. Now, however, that door is closing.

This Court has often reaffirmed Justice Holmes' statement that a regulation that goes "too far" can be a taking, see *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), quoted in *Lucas v. South Carolina Coastal Council*, 120 L. Ed. 2d at 812. This Court has also held that a governmental entity may be liable to pay money damages for just compensation when a regulation does indeed go too far, see *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304. As a result some property owners have sued the United States in United States Claims Court and have been awarded substantial money damages.

For example, in *Whitney Benefits v. United States*, 926 F.2d 1169, \$60 million plus interest was awarded because the federal Surface Mining Control and Reclamation Act prohibited the mining of a valuable coal deposit. Substantial judgments were also issued in cases involving denials of dredge and fill permits by the United States Army Corps of Engineers. See *Loveladies Harbor v. United States*, 21 Cl. Ct. 153 (\$2.6 million for 12.5 acres rendered worthless by a denial of a federal wetland dredge and fill permit); *Florida Rock Industries, Inc. v. United States*, 21 Cl. Ct. 161 (1990), appeal pending, *Federal Circuit Court of Appeals* (\$1.02 million awarded when 98 acres of limestone bearing land rendered worthless by a denial of federal wetland dredge and fill permit). See also *Formanek v. United States*, 26 Cl. Ct. 332 (1992) (\$933,921 awarded for wetland permit denial); see generally James S. Burling, *Property Rights, Endangered Species, Wetlands, and Other Critters--Is it Against Nature to Pay for a Taking?*, 27 LAND AND WATER L. REV. 309 (1992). Now, however, many of these cases which have vindicated the rights of property owners are jeopardized by the legacy of *UNR Industries*. That legacy is giving property owners the Hobson's choice of either

challenging overreaching regulations and permit denials *or* suing for money damages, but not both.

A. A Grave Injustice to the Rybacheks Is Likely To Result if UNR Industries Is Not Reversed

The plight of amici Stanley and Rosalie Rybachek provides a clear example of the inequitable consequences of the Federal Circuit's new rule. The Rybacheks are a husband and wife who own and work small mining claims in Alaska. In 1986 they were advised that regulations adopted by the EPA prohibited the use of hydraulic jets of water to extract ore-bearing gravel--an essential procedure for the profitable operation of their small placer mine. The Rybacheks brought suit in Federal District Court alleging, *inter alia*, that the EPA had effected a regulatory taking of their property.

In 1989, on the government's motion, the Federal District Court removed the Rybacheks' takings claim to the Claims Court. Acting pro se, the Rybacheks amended their District Court complaint (retaining the takings claim for purposes of appeal) and perfected their claim in Claims Court, Case No. 379-89L. After surviving a substantive motion to dismiss, *see Rybachek v. United States*, 23 Cl. Ct. 222, the Rybacheks were preparing for trial when the United States filed a second motion to dismiss based on the Federal Circuit's decision in the case below. In other words, the government now seeks to use *UNR Industries* to dismiss the Rybacheks' takings claim--which the government caused to be removed to the Claims Court in the first place. Moreover, the government is seeking this dismissal in the knowledge that the six year statute of limitations has expired, assuming that statute is not tolled during the pendency of the Rybacheks' other District Court claims.

The Rybacheks' plight graphically illustrates the dilemma created by the decision below. Litigants seeking to vindicate their constitutional rights will be forced to choose between appealing the underlying regulation *or* filing for money damages. Uncertainty as to the interplay of statutes of limitations and federal "ripeness" requirements will inevitably leave many meritorious claimants with no remedy whatever.

B. The Fallout from UNR Industries Is Extensive

The deleterious impacts of *UNR Industries* will not be confined to a few pro se litigants operating in the wilds of Alaska. In fact, several of the largest takings cases on record have already been jeopardized by that decision. In *Whitney Benefits* the claimant did everything that conscientious litigants can be expected to do. As the history outlined in the Claims Court and Federal Circuit decisions illustrate, *see* 18 Cl. Ct. 394 (1989), and 926 F.2d 1169, the property owners attempted a variety of administrative and legal actions in order to obtain permission to mine their coal. All failed. Five years and 364 days after the legislation which prohibited the beneficial use of their property was enacted, but before all appeals of the permit denials had been completed, the property owners filed suit in United States Claims Court for a regulatory taking. After a judgment of \$60 million was awarded, after this Court denied the government's motion for certiorari, but while the Claims Court still retained jurisdiction over the case to resolve certain technical issues, the government moved to dismiss based on *UNR Industries*. Thus, the conscientious decision to file the action prior to the expiration of the six year statute of limitations now threatens the property owner's very ability to receive compensation.

A similar story exists in *Loveladies Harbor*. There the owners of 12.5 acres of land rendered worthless by the

denial of a dredge and fill permit by the Army Corps of Engineers first tried to appeal the permit denial. That effort failed. See *Loveladies Harbor, Inc. v. Baldwin*, 751 F.2d 376 (3d Cir. 1984). Before the expiration of the statute of limitations the property owner filed an action in Claims Court. *Loveladies*, 21 Cl. Ct. at 154. The owner immediately moved to stay that action pending the outcome of the permit appeal. The takings lawsuit was revived after the permit denial was affirmed. *Id.* After the Claims Court awarded money damages, the government appealed the case to the Federal Circuit Court of Appeals. And now, as in the other takings cases, the property owners are faced with a motion to dismiss based upon *UNR Industries*.

In short, the Federal Circuit's over-literal Nineteenth Century reading of 28 U.S.C. § 1500 is a disaster for property owners and other litigants with legitimate claims against the government. Combined with rife uncertainty over the applicability of the statute of limitations for takings claims, the punishment will undoubtedly continue for the foreseeable future unless this Court reverses the decision below.

CONCLUSION

For the reasons set forth above, amici Pacific Legal Foundation and Stanley C. and Rosalie A. Rybachek respectfully request this Court to reverse the decision of the court below.

DATED: December, 1992.

Respectfully submitted,

RONALD A. ZUMBRUN
JAMES S. BURLING

*R. S. RADFORD

*Counsel of Record

Pacific Legal Foundation

2700 Gateway Oaks Drive, Suite 200

Sacramento, California 95833

Telephone: (916) 641-8888

*Attorneys for Amici Curiae, Pacific
Legal Foundation and Stanley C. and
Rosalie A. Rybachek*

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-166

KEENE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT*

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. A1-A34) is reported at 962 F.2d 1013. The opinion of the Court of Federal Claims¹ (Pet. App. E1-E27) is reported at 17 Cl. Ct. 146.

¹ Effective October 29, 1992, Congress renamed the United States Claims Court the "United States Court of Federal Claims." See Court of Federal Claims Technical and Procedural Improvements Act of 1992, Pub. L. No. 102-572, §§ 902, 911, 106 Stat. 4516, 4520. Throughout this brief, we refer to the court by its new name.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 1992. The petition for a writ of certiorari was filed on July 22, 1992, and was granted on October 19, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

Section 1500 of Title 28, U.S. Code, provides:

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

STATEMENT

Petitioner manufactured and sold products containing asbestos. From 1979 to 1987, petitioner litigated separate civil actions against the United States in three district courts and in the Court of Federal Claims. In each action, petitioner sought reimbursement for its liability to workers injured as a result of exposure to asbestos while working at naval shipyards or for private companies under contract to the United States Navy.²

² Petitioner's lawsuits were part of massive litigation against the United States over asbestos claims. At its height, the government was being sued in some 3,000 cases and faced potential liability in excess of \$40 billion. The Department of Justice created a special 35-lawyer section within its Civil Division solely to defend this litigation.

1. District Court Litigation

a. *Pennsylvania*. In June 1979, petitioner filed a third-party complaint against the United States in *Miller v. Johns-Manville Prods. Corp.*, No. 78-1283E (W.D. Pa.). Petitioner sought indemnification or contribution for any tort liability that it might incur for injuries caused by the plaintiff's exposure to asbestos while working for a private company that performed work for the United States Navy pursuant to a government contract. Pet. App. 11-13. In May 1980, the court granted petitioner's motion to dismiss its third-party complaint without prejudice. Pet. App. E15.

b. *New York*. In January 1980, petitioner filed an omnibus tort action against the United States in the United States District Court for the Southern District of New York. *Keene Corp. v. United States*, No. 80-Civ.-0401GLG. Petitioner sought to recover from the United States amounts that it had paid or expected to pay to some 14,000 asbestos tort claimants who were exposed to asbestos while working at naval shipyards or for private companies acting under contract for the United States Navy. In addition, petitioner asserted that the federal government's recoupment of payments under the Federal Employees Compensation Act, 5 U.S.C. 1500 (FECA), was a taking of petitioner's property without just compensation in violation of the Fifth Amendment. See J.A. 6-39.

On September 30, 1981, the district court dismissed the action, primarily on the ground that petitioner's administrative tort claims against the United States failed to satisfy the requirements of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2675(a). The court also held that it lacked jurisdiction to decide petitioner's takings claims. J.A. 41-57. The court of

appeals affirmed the district court's ruling, *Keene Corp. v. United States*, 700 F.2d 836 (2d Cir.), and this Court denied certiorari, 464 U.S. 864 (1983).

c. *District of Columbia*. In July 1982, after the district court in the Southern District of New York had rejected petitioner's tort claims, petitioner brought a second omnibus tort action against the United States in the United States District Court for the District of Columbia. In July 1984, the district court held that petitioner was attempting to relitigate issues decided in the New York litigation, and that consequently principles of issue preclusion required dismissal of the action. *Keene Corp. v. United States*, 591 F. Supp. 1340, 1345-1349 (D.D.C. 1984). The court of appeals affirmed the district court's ruling. *GAF Corp. v. United States*, 818 F.2d 901, 912-916 (D.C. Cir. 1987).

2. Court of Federal Claims Litigation

a. *Keene I*. In December 1979—while petitioner's third-party complaint in *Miller* was pending—petitioner filed an action against the United States in the Court of Federal Claims under the Tucker Act, 28 U.S.C. 1491. *Keene Corp. v. United States*, No. 579-79C. Petitioner sought indemnity from the United States for any amounts paid by petitioner to asbestos tort claimants exposed to asbestos while working at naval shipyards or for companies under contract to the United States Navy. Pet. App. H1-H20.

b. *Keene II*. On September 25, 1981—while petitioner's omnibus tort action was pending in New York—petitioner filed a second action in the Court of Federal Claims under the Tucker Act. *Keene Corp. v. United States*, No. 585-81C. In that action, peti-

tioner reiterated its claim that the government's recoupment of payments under FECA was a taking of property without just compensation. Pet. App. F1-F12.

3. The Section 1500 Motions

a. In February 1987, the United States filed a motion in the Court of Federal Claims pursuant to 28 U.S.C. 1500 to dismiss petitioner's Tucker Act complaints, and similar complaints brought by several other asbestos manufacturers, for lack of subject matter jurisdiction. The government contended that the Court of Federal Claims lacked jurisdiction because petitioner and the other claimants had district court suits involving the same dispute pending at the same time they were litigating their actions in the Court of Federal Claims.

In April 1987, the Court of Federal Claims granted the government's motion as to one claimant, Johns-Manville Corporation. *Keene Corp. v. United States*, 12 Cl. Ct. 197 (1987). The court did not rule on the motion with respect to petitioner or the other manufacturers, but noted that their claims likely would be dismissed under Section 1500 for want of jurisdiction. *Id.* at 198-199 n.1. The court of appeals affirmed, *Johns-Manville Corp. v. United States*, 855 F.2d 1556 (Fed. Cir. 1988), and this Court denied certiorari, 489 U.S. 1066 (1989).

b. In November 1988, the government filed a second motion to dismiss petitioner's claims under 28 U.S.C. 1500. The Court of Federal Claims granted the government's motion as to all plaintiffs except

GAF Corporation.³ The court held that Section 1500 required dismissal of the other asbestos manufacturers' claims because, at the time the actions were filed in the Court of Federal Claims, the plaintiffs had other actions involving the same dispute pending in other courts against the United States. The Court of Federal Claims rejected petitioner's argument that the subsequent termination of the district court actions vested it with jurisdiction over the complaints. Pet. App. E1-E27.

4. *The Court of Appeals' Decisions*

a. *The Panel Decision.* A panel of the court of appeals reversed. Pet. App. D1-D25. The panel held that "when an earlier-filed district court case is finally dismissed before the Claims Court entertains and acts on a § 1500 motion to dismiss, § 1500 does not bar Claims Court jurisdiction even though the dismissal may have occurred after the filing of the Claims Court action." Pet. App. D22. The panel acknowledged that a "not * * * unreasonable reading of the statute" would bar the Court of Federal Claims from exercising jurisdiction if the plaintiff had a related action pending in another court when it filed an action in the Claims Court. *Id.* at D23. But the

³ The Court of Federal Claims, relying on *Teecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966), held that Section 1500 did not apply to GAF because GAF filed its district court action one day after it filed suit in the Court of Federal Claims. Pet. App. E25-E26. The Court of Federal Claims subsequently rejected GAF's claims on the merits. *GAF Corp. v. United States*, 19 Cl. Ct. 490 (1990). The court of appeals affirmed that ruling, 923 F.2d 947 (Fed. Cir. 1991), and this Court denied certiorari, 112 S. Ct. 965 (1992).

court found that the statutory language was ambiguous, and that "policy and legislative history support a different reading." *Ibid.*

Judge Mayer dissented. He concluded that the panel's holding was "contrary to the unambiguous language of the statute, its purpose and history." Pet. App. D26. Judge Mayer reasoned that the jurisdiction of the Court of Federal Claims "should not depend on when a motion to dismiss under section 1500 is filed or is considered by this court." *Ibid.*

b. *The En Banc Decision.* The court of appeals granted rehearing en banc and affirmed the decision of the Court of Federal Claims in an opinion joined by nine of the ten judges on the court. Pet. App. A1-A24.

i. The court of appeals comprehensively reexamined prior judicial decisions construing Section 1500 and concluded that "section 1500 is rife with judicially created exceptions and rationalizations to the point that it no longer serves its purposes: to force an election of forum and to prevent simultaneous dual litigation against the government." Pet. App. A14. The court observed that "[i]t is a rare plaintiff who could not find an exception to his liking if he tried hard enough." *Id.* at A14-A15. The court declined petitioner's invitation to continue "the charade." *Id.* at A15.

The court of appeals concluded that the plain meaning of the statute and its purpose mandate a bright-line rule that the Court of Federal Claims lacks jurisdiction over a claim if the same claim is pending in another court. Accordingly, the court held:

- 1) if the same claim is pending in another court at the time the complaint is filed in the Claims

Court, the Claims Court has no jurisdiction, regardless of when an objection is raised or acted on; 2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction regardless of when the Court memorializes the fact by order of dismissal; and 3) if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata and available defenses apply.

Pet. App. A15.

The court of appeals declined to construe Section 1500 as permitting "a plaintiff to maintain cases in both courts until the government moves to dismiss the Claims Court suit or until a judge addresses the motion." Pet. App. A16. The court explained that such a rule would be "contrary to th[e] recognized purpose of section 1500," because it would "compel the government to defend two suits simultaneously." *Ibid.*

ii. The court of appeals reexamined several of its prior decisions that created exceptions to the jurisdictional bar of Section 1500 in order to ameliorate its perceived harshness. Adhering to this Court's decision in *Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924), the court of appeals held that possible hardship to a plaintiff "does not justify rewriting the statute." Pet. App. A17. Accordingly, the court overruled *Brown v. United States*, 358 F.2d 1002 (Ct. Cl. 1966), and *Casman v. United States*, 135 Ct. Cl. 647 (1956). Pet. App. A17 & n.3. *Brown* and *Casman* had both construed Section 1500 to allow plaintiffs to maintain simultaneous actions concerning the same dispute in the Court of Federal Claims

and another court. Pet. App. A13-A14, A17. The court also overruled *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966), which had held that Section 1500 did not apply if the plaintiff first filed an action in the Court of Federal Claims and thereafter filed an action concerning the same dispute in another court. Pet. App. A18-A19.

iii. The court reaffirmed the principle that two actions involve the same "claim" for the purposes of Section 1500 if they are based on the same operative facts. The court rejected the contention that a "claim" refers to actions based on the same legal theory. The court explained that such a narrow construction of the term "claim" would render the statute ineffective against the very abuse it was intended to prevent. Pet. App. A19-A20.

iv. Finally, the court of appeals rejected the petitioner's argument that its decision should not be given retroactive effect. The court explained that, because a federal court "lacks discretion to consider the merits of a case over which it is without jurisdiction, * * * a jurisdictional ruling may never be made prospective only." Pet. App. A22-A23, quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981).

v. Chief Judge Nies joined the court's opinion, but also filed a separate opinion suggesting that, in some circumstances when a party is barred by Section 1500 from litigating simultaneous actions against the United States, equitable tolling of the statute of limitations may be appropriate. Pet. App. A24-A25.

vi. Judge Plager dissented. Pet. App. A25-A34. Judge Plager would have ruled that "when an earlier-filed district court case is finally dismissed before the

Claims Court entertains and acts on a § 1500 motion to dismiss, § 1500 does not bar Claims Court jurisdiction." *Id.* at A31.

SUMMARY OF ARGUMENT

1. a. Section 1500 provides that the Court of Federal Claims "shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States" or its agents. Congress hardly could have chosen more sweeping and definitive language to bar plaintiffs from litigating a dispute against the government simultaneously in the Court of Federal Claims and another court. Section 1500 applies to any claim "in respect to which" the plaintiff has pending another action—that is, any claim that "relates to" or is "concerned with" a pending action. Because Section 1500 applies only if the plaintiff "has pending" another action, it does not bar a plaintiff from bringing an action in the Court of Federal Claims if a related action in another court is no longer pending. But the Court of Federal Claims plainly lacks jurisdiction while a related action is pending in another court, and the termination of the related action does not confer jurisdiction retroactively on the Court of Federal Claims.

b. The legislative history of Section 1500 confirms that Congress intended to bar a plaintiff from engaging in simultaneous litigation of a dispute in the Court of Federal Claims and another court. The statute was specifically intended to apply to the so-called "cotton claimants," a group of plaintiffs who brought actions against the United States in the Court of Claims and parallel actions against federal offi-

cials in other courts. The stated purpose of the statute was "to put that class of persons to their election either to leave the Court of Claims or to leave the other courts." Cong. Globe, 40th Cong., 2d Sess. 2769 (1868).

c. Petitioner is incorrect in contending that Section 1500 applies only if principles of claim preclusion would require the plaintiff to pursue all its legal theories in a single action. By its terms, Section 1500 applies if a claim is "in respect to"—i.e., related to—a pending action in another court. A claim that is based on the same set of facts as a pending action plainly is related to the action. Moreover, petitioner's proposed construction would foster the very type of simultaneous litigation that Section 1500 was designed to stop. The Court of Federal Claims has no jurisdiction to hear claims under the Federal Tort Claims Act; the district courts have no jurisdiction to hear claims under the Tucker Act for more than \$10,000. Consequently, petitioner's proposal would allow plaintiffs to engage in simultaneous litigation of a dispute in the Court of Federal Claims (on a contract theory) and in the district court (on a tort theory). Indeed, petitioner's construction of the statute would have allowed the cotton claimants to continue to maintain simultaneous actions against the United States and federal officials.

d. Petitioner is also incorrect in contending that Section 1500 allows a plaintiff to engage in simultaneous litigation against the United States as long as the other actions are terminated before the Court of Federal Claims rules on a motion to dismiss for lack of jurisdiction. Section 1500 plainly provides that the Court of Federal Claims "shall not have jurisdiction" if the plaintiff "has pending" a related

action against the United States in another court. The Court of Federal Claims does not acquire jurisdiction merely because the government fails to learn of the existence of a related action or the Court of Federal Claims fails to rule on a motion to dismiss. That reading of Section 1500 is confirmed by the original statutory language, which provided that "no person shall file or prosecute any claim * * * for or in respect to which he * * * has pending any suit or process." 15 Stat. 77. When Congress replaced that phrase in 1948, it did not intend to alter the meaning of the statute.

Petitioner's proposed construction would not prevent dual simultaneous litigation. Given the minimal requirements of notice pleading, and the difficulties of coordinating the government's numerous litigating components, a plaintiff could often litigate against the government on two fronts at the same time. If plaintiffs understand that the Court of Federal Claims will be required to dismiss their action if they litigate simultaneously in another forum, Section 1500 will be largely self-policing.

Petitioner's construction also ignores the fundamental rule that limitations on a court's subject matter jurisdiction cannot be waived by the parties or the court. There is no source of authority that would permit a court to overlook the defect in its subject matter jurisdiction.

e. Although petitioner contends that Section 1500 is out of harmony with the legal landscape and produces harsh results, this Court has already declined a litigant's invitation to "add an exception [to Section 1500] to remove apparent hardship." *Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924). In any event, a rule barring litigation of the same dispute in two courts at once discourages

wasteful and duplicative litigation and conserves public resources. Those policies are hardly out of keeping with the current legal landscape. Moreover, petitioner and its amici greatly exaggerate the harsh results that will flow from interpreting Section 1500 as it is written. In many cases, plaintiffs will be able to obtain complete relief in a single action. Where that is not possible, the generous six-year period of limitations applicable to Tucker Act claims affords plaintiffs an opportunity to bring a second action in all but the most protracted cases. If a plaintiff has acted diligently and refrained from engaging in simultaneous litigation, equitable tolling of a statute of limitations may be available in appropriate circumstances.

2. a. The court of appeals correctly concluded that it was required to give its decision retroactive effect. Because the federal courts have no authority to expand their subject matter jurisdiction, "a jurisdictional ruling may never be made prospective only." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981). In any event, there is no basis for petitioner's suggestion that the Court's decision should not apply to petitioner. Apart from the Article III concerns that petitioner's argument raises, petitioner is not entitled to a prospective ruling because it is not relying on clear past precedent, but rather on arguments that prior judicial exceptions to Section 1500 should be expanded.

b. Petitioner did not seek equitable tolling of the statute of limitations in the courts below, and those courts did not consider that issue. Accordingly, this Court should not address it either. In any event, equitable tolling is not appropriate in the circumstances of this case. Petitioner did precisely what

Section 1500 forbids. It pursued multiple actions in multiple courts seeking essentially the same relief against the United States based on essentially the same facts—the government's alleged responsibility for injuries to workers exposed to asbestos while working in naval shipyards or on federal contracts. Indeed, petitioner litigated precisely the same takings claim simultaneously in the Court of Federal Claims and the district court. None of the established judicial exceptions to Section 1500 authorized petitioner's extraordinary seven-year campaign of simultaneous litigation. Accordingly, petitioner is not entitled to equitable relief.

ARGUMENT

I. SECTION 1500 BARS SIMULTANEOUS LITIGATION OF A DISPUTE IN THE COURT OF FEDERAL CLAIMS AND ANOTHER COURT

A. Section 1500 Provides That The Court Of Federal Claims Lacks Jurisdiction If The Plaintiff Has A Related Action Pending In Another Court

Section 1500 of Title 28 provides:

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

As the Court observed in construing the predecessor of Section 1500, "the words of the statute are plain, with nothing in the context to make their meaning doubtful; no room is left for construction, and we

are not at liberty to add an exception in order to remove apparent hardship." *Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924). See generally *Estate of Cowart v. Nicklos Drilling Co.*, 112 S. Ct. 2589, 2594 (1992); *King v. St. Vincent's Hospital*, 112 S. Ct. 570, 575 n.14 (1991). Section 1500 speaks in the language of subject matter jurisdiction. It provides in absolute and sweeping terms that the Court of Federal Claims "shall not have jurisdiction of any claim for or in respect to which the plaintiff * * * has pending in any other court any suit or process" against the United States or "any person * * * acting or professing to act, directly or indirectly under the authority of the United States" (emphasis added). Congress hardly could have chosen more definitive and emphatic language to bar plaintiffs from litigating a dispute with the government simultaneously in the Court of Federal Claims and in another court.

As petitioner observes (Pet. Br. 18), the word "claim" lacks a single "plain" meaning. See *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1560 (Fed. Cir. 1988), cert. denied, 489 U.S. 1066 (1989). But Congress eliminated any ambiguity that attaches to the term "claim" by providing that the Court of Federal Claims lacks "jurisdiction of any claim for or in respect to which the plaintiff * * * has pending * * * any other suit or process" against the United States or its agents. A claim is "in respect to" a suit if it "relate[s] to" the suit, or is "concerned with" the suit, or "ha[s] regard or reference to the suit. *Webster's Third New International Dictionary* 1934 (1986). Cf. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (discussing meaning of the word "respecting" in the Establishment Clause of the First Amendment).

Accordingly, the language of Section 1500 bars the Court of Federal Claims from assuming jurisdiction over a claim if the plaintiff has a related action pending in another court.

By its terms, Section 1500 deprives the Court of Federal Claims of jurisdiction if the plaintiff "has pending" a related suit in another court. If the related action is no longer pending, the statutory language does not prevent the plaintiff from bringing a subsequent action in the Court of Federal Claims. But a "pending" action does not become a "non-pending" action merely because the parties fail to bring it to the attention of the Court of Federal Claims, or that court fails to rule on a motion to dismiss. See *Hill v. United States*, 8 Cl. Ct. 382, 385-386 (1985) ("words 'shall not' are an absolute bar depriving this court of any discretion, whatsoever, when duplicative claims are filed").⁴

⁴ This Court's prior decisions construing the predecessor of 28 U.S.C. 1500, Section 154 of the Judicial Code, consistently have adhered to the plain language of the statute. In *Corona Coal Co. v. United States*, 263 U.S. 537 (1924), the Court of Claims dismissed the plaintiff's action, and the plaintiff took an appeal to this Court. After the Court of Claims entered judgment, the plaintiff brought separate actions in the district court "because [the actions] were about to become barred by expiration of the statutory period of limitation." 263 U.S. at 540. This Court held that Section 154 required dismissal of the appeal. It concluded that "the words of the statute are plain," and therefore the Court is "not at liberty to add an exception in order to remove apparent hardship in particular cases." *Ibid.* See also *Ex parte Skinner & Eddy Corp.*, 265 U.S. 86, 95 (1924) (where the Court of Claims grants the plaintiff's motion to dismiss, and the plaintiff then brings a suit in state court "on substantially the same causes of action," Section 154 "necessarily prevent[s] the [plain-

B. The Purpose Of Section 1500 Is To Bar Plaintiffs From Suing The United States Or Its Agents In The Court Of Federal Claims And Another Court

1. The legislative history of 28 U.S.C. 1500 confirms that Congress intended to bar simultaneous litigation of a dispute in the Court of Federal Claims and another court. During the Civil War, the government seized property in the Confederate States pursuant to the Captured and Abandoned Property Act of 1863, ch. 120, 12 Stat. 820. Persons claiming ownership of property seized under that Act were permitted to bring an action against the United States in the Court of Claims to recover any proceeds from the sale of the property, but were required to prove that they had not given any aid or comfort to the rebellion. § 3, 12 Stat. 820. The "cotton claimants" (so called because most of the claims were for seized cotton) not only brought a large number of actions against the United States in the Court of Claims, but also brought parallel tort actions against federal officials in other courts. See Pet. App. A7; David Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and Its Agents*, 55 Geo. L.J. 573, 575-576 (1967).

Congress enacted the original version of Section 1500, Section 8 of the Act of June 25, 1868, ch. 71, 15 Stat. 77, to put an end to this dual litigation. Section 8 provided:

tiff] from suing on those claims in the Court of Claims, and exclude[s] its jurisdiction of them"); *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932) (plain language of Section 154 inapplicable if simultaneous action is against the United States rather than a federal official). In 1948, Section 154 was amended to apply to multiple actions against the United States. See p. 20, *infra*.

And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action * * * arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

Act of June 25, 1868, ch. 71, § 8, 15 Stat. 77.⁵

Senator Edmunds, the sponsor of the legislation, explained its purpose:

The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time en-

⁵ The text of Section 8, as passed by both the Senate and the House of Representatives, provided that "no person shall file or prosecute any claim or suit in the Court of Claims, or on appeal therefrom, for or in respect to which he * * * shall have commenced and has pending, *or shall commence and have pending*, any suit or process in any other court" against a federal official. Cong. Globe, 40th Cong., 2d Sess. 2769 (1868) (statement of Sen. Edmunds); *id.* at 3269 (emphasis added); Journal of the Senate, 40th Cong., 2d Sess. 445 (1868). The enrolled version of the bill omitted the highlighted clause. There is no recorded explanation of the omission. Pet. App. A8-A9 n.1, A19.

deavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

Cong. Globe, 40th Cong., 2d Sess. 2769 (1868). The stated purpose of Section 8 was thus to require plaintiffs to make an election between a suit in the Court of Claims and one brought in another court against an agent of the government. *Ibid.*

Section 8 was incorporated into the Revised Statutes of 1874 with minor changes that were not intended to alter its meaning. See 2 Cong. Rec. 129 (1873) (statement of Rep. Butler).⁶ It was later reenacted without change as Section 154 of the Judicial Code of 1911. Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1138. Congress reenacted the statute as Section 1500 of the Judicial Code of 1948. See Act of June 25, 1948, ch. 646, 62 Stat. 942. The 1948 legislation (1) deleted the phrase "or in the Supreme

⁶ The 1874 statute provided:

No person shall file or prosecute in the Court of Claims, or in the Supreme Court on appeal therefrom, any claim for or in respect to which he or any assignee of his has pending in any other court any suit or process against any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, mediately or immediately, under the authority of the United States.

Revised Statutes, Title 13, ch. 21, § 1067, 18 Stat. 197 (1874).

Court on appeal therefrom" as unnecessary; (2) added the phrase "against the United States" in order to bar simultaneous actions against the United States as well as actions against federal officials; and (3) replaced the phrase "No person shall file or prosecute" with "The Court of Claims shall not have jurisdiction of" to make clear that Section 1500 is a jurisdictional statute. See Reviser's Notes, 28 U.S.C. 1500, at 1862 (1948).

2. We do not contend that Section 1500 must be interpreted to bar successive litigation—only simultaneous litigation. It is true, as petitioner recognizes (Pet. Br. 31), that Senator Edmunds' statement indicates that Section 8 was intended to advance not only "a general policy seeking to protect the Government against the burdens of multiple

⁷ In 1982, Congress passed legislation substituting the new Claims Court for the old Court of Claims. See Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 40. Most recently, in 1992, Congress passed legislation substituting "Court of Federal Claims" for "Claims Court." See note 1, *supra*.

A bill entitled the "Court of Federal Claims Technical and Procedural Improvements Act of 1992," introduced by Senator Heflin on April 2, 1992, would have repealed Section 1500. See S. 2521, 102d Cong., 2d Sess. § 10(c) (1992); 138 Cong. Rec. S4830-S4832 (daily ed. Apr. 2, 1992). On April 29, 1992, six days after the court of appeals issued its en banc decision in this case, the Senate Committee on the Judiciary held hearings on the proposed legislation. See 138 Cong. Rec. D465 (daily ed. Apr. 29, 1992). As ultimately enacted, the Court of Federal Claims Technical and Procedural Improvements Act of 1992 amended Section 1500 by substituting the "Court of Federal Claims" for the "Claims Court," but did not repeal or otherwise modify the statute. See Pub. L. No. 102-572, §§ 901-911, 106 Stat. 4516-4520.

simultaneous litigation," but also to "preclud[e] * * * a second adjudication after a first decision on the merits." By its terms, however, the statute applies only if the plaintiff "*has pending* any suit or process in any other court." 15 Stat. 77 (emphasis added). The language of the statute thus does not preclude a second adjudication if the first action is no longer "pending." See p. 16, *supra*.

C. Section 1500 Is Not Limited To Legal Theories That Must Be Litigated In A Single Action Under Principles Of Claim Preclusion

1. In its brief on the merits, petitioner argues (Pet. Br. 18-32) that Section 1500 applies only if principles of claim preclusion would require the plaintiff to present all its legal theories in a single action. Petitioner contends (Pet. Br. 18-19) that the word "claim" in Section 1500 is "naturally read as referring to the law of claim preclusion," and that "[t]he statute should be read to deem a claim in one case 'for or in respect to [the claim]' in another only when ordinary claim-splitting preclusion principles would say that they should (and, therefore, could) be brought together if they were both brought against the United States." That argument was not presented to the courts below or in the petition for certiorari.⁸ In any event, it is incorrect.

⁸ The questions presented in the petition for certiorari (which focused on the meaning of the statutory phrase "has pending" rather than the definition of the term "claim") bear little resemblance to the questions presented in petitioner's brief on the merits. Compare Pet. i with Pet. Br. i. A brief on the merits "may not raise additional questions or change the substance of the questions already presented in [the petition]." Sup. Ct. R. 24.1(a).

Contrary to petitioner's contention, the term "any claim" in Section 1500 is most naturally read not as a veiled reference to the law of claim preclusion, but simply as a reference to any claim for relief in the Court of Federal Claims. Moreover, petitioner's argument ignores the statutory language that immediately follows the term "any claim." Under Section 1500, the Court of Federal Claims lacks jurisdiction over "any claim for or in respect to which the plaintiff * * * has pending any suit or process in any other court" (emphasis added). As we have explained, see pp. 15-16, *supra*, a claim is "in respect to" a suit or process if it "relates to" or is "concerned with" the suit. Accordingly, the proper jurisdictional inquiry under Section 1500 is not whether the plaintiff is pursuing one or several legal theories—let alone whether principles of claim preclusion would permit or require him to pursue all his theories in a single action—but simply whether the plaintiff's claim is *related* to other litigation that he has pending in another court. The court of appeals' definition of a claim as including all legal "theories that arise from the same operative facts," Pet. App. A20, is consistent with this statutory language.

Even if petitioner were justified in looking to principles of claim preclusion, a "claim" for preclusion purposes consists of "all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose." Restatement (Second) of Judgments § 24(1) (1982). A "transaction" refers to "a natural grouping or common nucleus of operative fact. * * * That a number of different legal theories casting liability

on an actor may apply to a given episode does not create multiple transactions and hence multiple claims. This remains true although the several legal theories * * * would call for different measures of liability or different kinds of relief." *Id.* comments b and c. That is precisely the approach followed by the court of appeals in *Johns-Manville Corp. v. United States*, 855 F.2d 1563 (Fed. Cir. 1988), and re-affirmed in this case. See Pet. App. A19. Applying that definition of "claim," petitioner's tort actions were not only actions "respecting" petitioner's claims in the Court of Federal Claims, but were actions on the very same claim.⁹

2. Petitioner relies not on the definition of "claim" for purposes of claim preclusion, but on an exception to the general rule of preclusion that applies if "[t]he plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts." Restatement (Second) of Judgments § 26(1)(c) & comment c (1982). There is no basis in the language or history of Section 1500 for applying that exception to permit simultaneous litigation in the Court of Federal Claims and other courts.

Petitioner's proposed construction of Section 1500 would almost never prevent a plaintiff from litigat-

⁹ Petitioner's attempt to link Section 1500 to principles of claim preclusion is misguided for another reason as well. The law of claim and issue preclusion governs the preclusive effect of judgments. See Restatement (Second) of Judgments ch. 1, at 1 (1982). In the absence of a judgment, principles of claim and issue preclusion are not concerned with simultaneous litigation of a dispute in different courts.

ing a dispute with the United States in two courts at once. The Court of Federal Claims has no jurisdiction to decide claims under the Federal Tort Claims Act, and the district courts have no jurisdiction to decide claims under the Tucker Act if the amount sought by the plaintiff is greater than \$10,000. See 28 U.S.C. 1346(a), 1491. Consequently, petitioner's construction of Section 1500 would allow any plaintiff seeking more than \$10,000 to litigate against the United States in district court under a tort theory while simultaneously litigating the very same set of facts, and seeking the very same relief, under a contract or taking theory in the Court of Federal Claims. Indeed, petitioner's construction of the statute would have allowed the cotton claimants to maintain simultaneous actions against the United States and federal officials. Because the cotton claimants themselves were pursuing different legal theories that could not be asserted together in one court, Section 1500 should not be read to reach only actions involving identical legal theories, or actions that can all be brought in the same court.¹⁰

¹⁰ Petitioner's contention (Pet. Br. 32) that its interpretation of Section 1500 would have prevented the cotton claimants from suing in two courts at once is unconvincing. No court had jurisdiction to decide both the cotton claimants' statutory claims against the United States and their tort claims against federal officials. See *Johns-Manville*, 855 F.2d at 1561. Petitioner asserts that principles of claim preclusion would have required plaintiffs to bring statutory claims and tort claims against the United States in a single suit. But as petitioner recognizes (Pet. Br. 32), no court had jurisdiction to entertain tort claims against the United States in 1868. Petitioner's assertion thus rests on an unsupported assumption that if the cotton claimants had been permitted to pursue tort claims against the United States in

3. Petitioner is wrong in asserting (Pet. Br. 22) that "it was the clear law in the Court of Claims that Section 1500 did not apply where two claims could not both be brought in the same court." In fact, petitioner's proposed construction of Section 1500 goes well beyond any of the judicial exceptions to the statute that were overruled by the court of appeals.

a. The court of appeals reaffirmed the principle that Section 1500 applies when two actions arise out of a single "set of underlying facts." Pet. App. A19. See *Johns-Manville Corp.*, 855 F.2d at 1563 (for purposes of Section 1500, "claim" is "defined by the operative facts alleged, not the legal theories raised"); *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 138 Ct. Cl. 648, 652 (1957); *National Cored Forgings Co. v. United States*, 132 Ct. Cl. 11, 19-20 (1955); *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438, 440 (1931), cert. denied, 310 U.S. 627 (1940). Because petitioner's proposed construction of Section 1500 was not settled law—and, indeed, is contrary to it—it does not "deserve respect under the doctrine of *stare decisis*." Pet. Br. 22.¹¹

1868, they would have been permitted to do so in the Court of Claims. Even assuming that such claims could have been brought together, it is far from clear that principles of claim preclusion would have barred separate actions. "Although the 'same evidence' standard was '[o]ne of the tests' used at the time, *The Haytian Republic*, 154 U.S. 118, 125 (1894), it was not the only one." See *Nevada v. United States*, 463 U.S. 110, 130-131 n.12 (1983).

¹¹ For the same reason, there is no basis for presuming that Congress was aware of petitioner's proposed construction or intended to adopt it when it amended Section 1500 in 1982 to substitute the Claims Court for the Court of Claims. See *Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978). Indeed,

There is also no basis for petitioner's suggestion (Pet. Br. 24) that the court of appeals' definition of "claim" should be rejected because it is too vague or difficult to apply. The court of appeals' definition applies not only in the context of Section 1500, but in a variety of other contexts as well. See, e.g., *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966) (pendent jurisdiction over nonfederal claims that "derive from a common nucleus of operative fact"); *Maher v. Gagne*, 448 U.S. 122, 132-133 n.15 (1980) (attorney's fees available under 42 U.S.C. 1988 for claims arising out of a "common nucleus of operative fact"); Restatement (Second) of Judgments § 24(1) (1982) (claim preclusion).

b. In *Casman v. United States*, 135 Ct. Cl. 647 (1956), the court created an exception to Section 1500 that applied when a plaintiff sought damages in the Court of Federal Claims and equitable relief in another court. The plaintiff in *Casman* was a former federal employee who sought reinstatement in the district court and back pay in the Court of Claims. The Court of Claims concluded that Section 1500 should not be construed to bar simultaneous litigation when (1) the remedy sought in the district court is "entirely different" from that sought in the Court of Claims, and (2) the Court of Claims has no jurisdiction to award the type of relief sought in the district court. 135 Ct. Cl. at 649-650. See also *Johns-Manville*, 855 F.2d at 1566-1567 (*Casman* exception

to the extent that such arguments have weight, Congress's recent amendment of Section 1500 following the court of appeals' en banc decision, and its failure to enact a proposal to repeal Section 1500, undermines petitioner's position. See note 7, *supra*.

does not apply where plaintiff is seeking monetary relief from both courts); *Boston Five Cents Savings Bank v. United States*, 864 F.2d 137, 139 (Fed. Cir. 1988) (*Casman* limited to situations where "different types of relief are sought"); *Pitt River Home & Agricultural Coop. Assoc.*, 215 Ct. Cl. 959, 961 (1977) (inquiry under *Casman* is whether the plaintiff is "seeking the same relief" in the Court of Claims as in the district court); *Nonella v. United States*, 16 Cl. Ct. 290, 293 (1989) (*Casman* exception is "limited" to "where the plaintiff seeks substantially different relief in each forum"); *Hill v. United States*, 8 Cl. Ct. at 387-388 (the *Casman* exception does not apply where plaintiff seeks monetary relief in both the district court and the Claims Court, even if she also seeks declaratory relief in the district court).¹²

The *Casman* exception does not apply in this case. See Pet. App. D20; Alaska Br. 23; Cheyenne-Arapaho Tribes Br. 6. The relief sought in petitioner's district court actions was not "entirely different" from

¹² In addition to *Casman*, petitioner cites two brief orders of the Court of Claims in support of its assertion that it was "clear law" that Section 1500 did not apply whenever two claims could not be brought in the same court. Pet. Br. 22 (citing *Allied Materials & Equipment Co. v. United States*, 210 Ct. Cl. 714 (1976), and *Prillman v. United States*, 220 Ct. Cl. 677 (1979)). The facts of *Prillman* were similar to those of *Casman*—a discharged federal employee sought both reinstatement and back pay in excess of \$10,000. And although *Allied Materials* read *Casman* to apply when a plaintiff cannot "combine all its claims" in a single court, 210 Ct. Cl. at 716, that reading is contrary to the overwhelming weight of authority limiting *Casman* to situations in which the plaintiff sought different forms of relief.

the relief it sought in the Court of Federal Claims. 135 Ct. Cl. at 650. On the contrary, petitioners' actions in the district courts and its actions in the Court of Federal Claims sought precisely the same type of relief—damages for injuries caused by workers' exposure to asbestos. Consequently, the Court need not address the validity of the *Casman* exception in this case.

In any event, the court of appeals correctly concluded that *Casman* is inconsistent with the language and purpose of Section 1500. A suit seeking equitable relief rather than damages is nevertheless a "suit or process." And a claim for damages plainly is a claim "with respect to" a suit for injunctive relief based on the same set of facts. As a leading commentator has observed, "*Casman* is one of several major decisions under section 1500 in which the Court of Claims has overridden the words of the section in favor of a result it deemed desirable." See Schwartz, 55 Geo. L.J. at 587-588. But where "the words of the statute are plain," the courts are "not at liberty to add an exception in order to remove apparent hardship." *Corona Coal*, 263 U.S. at 540.¹³

¹³ In 1982, Congress eliminated the problem that concerned the court in *Casman*. Federal employees are now permitted to seek both back pay and reinstatement in a single action in the Court of Federal Claims. See 28 U.S.C. 1491(a)(2).

D. Section 1500 Does Not Permit A Plaintiff To Engage In Simultaneous Litigation Against the United States As Long As The Second Action Is Terminated Before The Court Of Federal Claims Rules On A Motion To Dismiss

Petitioner also contends (Pet. Br. 33-42) that Section 1500 does not prevent a plaintiff from maintaining simultaneous actions in the Court of Federal Claims and another court as long as the plaintiff dismisses (or otherwise terminates) the second action before the Court of Federal Claims rules on a motion to dismiss for want of jurisdiction. As petitioner concedes (Pet. Br. 33), its position is contrary to the rule that "[t]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 830 (1989) (citing *Smith v. Sperling*, 354 U.S. 91, 93 n.1 (1957)). It is also inconsistent with the language and purpose of Section 1500.

1. By its terms, Section 1500 deprives the Court of Federal Claims of subject matter jurisdiction if the plaintiff "has pending" another action. Pet. App. A16. A "pending" action is not transformed into a "non-pending" action merely because the parties fail to bring the existence of the action to the attention of the Court of Federal Claims, or that court fails to rule on a motion to dismiss. If the related action is no longer pending, Section 1500 does not prevent the plaintiff from bringing an action in the Court of Federal Claims. But the fact that an action in another court has ended does not imply that the Court of Federal Claims had jurisdiction while the other action was pending.

Our reading of Section 1500 is confirmed by the original statutory language, which provided that "no person shall file or prosecute any claim * * * for or in respect to which he * * * has pending any suit or process in any other court." 15 Stat. 77. That language plainly barred a plaintiff from filing or litigating an action in the Court of Claims while a related action was pending. In 1948, Congress replaced the phrase "no person shall file or prosecute" with the phrase "[t]he United States Court of Claims shall not have jurisdiction of." That change of "phraseology," see Reviser's Notes, 28 U.S.C. 1500, at 1862 (1948); H.R. Rep. No. 308, 80th Cong., 1st Sess. A140 (1947), merely recognized that the statute is jurisdictional in nature. See *Ex parte Skinner & Eddy Corp.*, 265 U.S. at 95. There is thus no basis for concluding that the 1948 amendments authorized plaintiffs to engage in simultaneous litigation. See *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 227 (1957) (no change in the law should be presumed from the 1948 revision of the Judicial Code "unless an intent to make such changes is clearly expressed").¹⁴

¹⁴ There is no merit to petitioner's argument (Pet. Br. 34) that the phrase "shall not have jurisdiction" in Section 1500 should be construed to mean "shall not have jurisdiction to render judgment." To be sure, other provisions of Title 28 that confer jurisdiction on the Court of Federal Claims use the phrase "shall have jurisdiction to render judgment." See, e.g., 28 U.S.C. 1491(a)(1), 1496, 1497, 1499, 1503. But Congress used the phrase "shall not have jurisdiction" in other provisions that limit the jurisdiction of the Court of Federal Claims. See 28 U.S.C. 1501, 1502. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is gen-

2. Petitioner's proposed construction would permit plaintiffs to litigate simultaneously in the Court of Federal Claims and a district court as long as they were careful to terminate the district court litigation before the Court of Federal Claims ruled on a motion to dismiss for lack of jurisdiction. That rule would not prevent—and, indeed, would encourage—dual simultaneous litigation against the government. Because of the minimal requirements of notice pleading under the Federal Rules of Civil Procedure, the government might not learn until well into the litigation that a complaint filed in a district court involved the same dispute as a complaint filed in the Court of Federal Claims. The government's ability to identify related actions would be further limited by the sheer volume of civil litigation against the United States, and by the difficulties of coordinating the government's many litigating components, including the various divisions of the Department of Justice, the 94 United States Attorneys' Offices, and numerous federal agencies.

Petitioner's proposed rule "would foster just the type of occurrence which section 1500 was enacted to prevent, i.e., the maintaining of two suits against the

erally assumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). The obvious meaning of the phrase "shall not have jurisdiction" is that the Court of Federal Claims lacks jurisdiction to hear or render judgment on the claim. Cf. 28 U.S.C. 1508 ("The Court of Federal Claims shall have jurisdiction to hear and to render judgment upon any petition under section 6226 or 6228(a) of the Internal Revenue Code of 1954.").

United States on the same claims and at the same time in two different courts." *Wessel, Duval & Co. v. United States*, 129 Ct. Cl. 464, 465 (1954). In contrast, the court of appeals' construction furthers the statutory purpose of preventing dual simultaneous litigation. The plaintiff is in the best position to determine whether it is litigating the same dispute in two different forums. If plaintiffs know that the Court of Federal Claims will be required to dismiss their action if they pursue simultaneous litigation in another court, Section 1500 will be largely self-policing.

3. Section 1500 imposes a limitation on the subject matter jurisdiction of the Court of Federal Claims. It is well established that such limitations cannot be waived by the parties or the court; it is the court's duty to police its own jurisdictional boundaries. See *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982); *Mansfield, Coldwater & Lake Michigan Ry. v. Swan*, 111 U.S. 379, 383 (1884). Petitioner would disregard that fundamental principle by treating Section 1500 as a "free floating jurisdictional bar that attaches only when the government files a motion to dismiss or, worse, when the court gets around to acting on it." Pet. App. A16. See also *id.* at D26. Similarly, petitioner's contention (Pet. Br. 35-36) that the Court of Federal Claims should be permitted to overlook defects in its subject matter jurisdiction is inconsistent with the principle that a federal court has no discretion to empower itself to act where Congress has chosen to deprive it of subject matter jurisdiction. See *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988); *De La Rama S.S. Co. v. United States*, 344 U.S. 386, 390 (1953). See also

Torres v. Oakland Scavenger Co., 487 U.S. 312, 317 n.3 (1988) ("litigant's failure to clear a jurisdictional hurdle can never be 'harmless' or waived by a court").

Newman-Green v. Alfonzo-Larrain, 490 U.S. 826 (1989), does not support petitioner's argument. In that diversity case, the Court held that a court of appeals has authority to grant a motion to dismiss a dispensable nondiverse party without remanding to the district court. The Court found a "source of authority" for that action in Fed. R. Civ. P. 21. 490 U.S. at 832. There is no analogous source of authority that would permit the Court of Federal Claims to disregard the jurisdictional bar of Section 1500. In *Newman-Green*, moreover, the Court emphasized that the authority to dismiss a nondiverse party should be exercised only after careful consideration of whether dismissal "will prejudice any of the parties in the litigation." 490 U.S. at 837-838. When a plaintiff disregards the clear command of Section 1500, the government is prejudiced by having to defend itself in two courts at the same time. Cf. *Hallstrom v. Tillamook County*, 493 U.S. 20, 26-31 (1989) (declining to give "flexible" construction to clear statutory precondition to suit).¹⁵

¹⁵ Petitioner also contends (Pet. Br. 37) that its proposed construction of Section 1500 is analogous to the rule that equitable tolling of statutes of limitations is available in suits against the United States unless Congress has expressed a contrary intent. See *Irwin v. Veterans Admin.*, 111 S. Ct. 453, 457 (1990). In Section 1500, however, Congress clearly provided that the Court of Federal claims "shall not have jurisdiction of any claim * * * in respect to which" the plaintiff has another action pending.

Weinberger v. Salfi, 422 U.S. 749 (1975), and *Mathews v. Eldridge*, 424 U.S. 319 (1976), are inapposite. Those cases

4. Petitioner contends (Pet. Br. 38-39) that its construction was adopted in *Brown v. United States*, 358 F.2d 1002 (Ct. Cl. 1966), and therefore is entitled to respect under principles of *stare decisis*. But the holding of *Brown* is more circumscribed than petitioner suggests; has no application to the facts at issue; and is, in any event, inconsistent with Section 1500.

a. In *Brown*, a widow and her children pursued takings claims for more than \$10,000 simultaneously in the Court of Claims and a district court. *Brown*, 358 F.2d at 1004-1005. The district court dismissed the action for want of jurisdiction. See 28 U.S.C. 1346(a)(2), 1491. The Court of Claims concluded that Section 1500 did not require it to dismiss plaintiff's action. The court expressly distinguished several of its prior decisions holding that Section 1500 barred the Claims Court action on the ground that the district court clearly had jurisdiction of the claims in those cases. 358 F.2d at 1005 (citing *British American Tobacco*, 89 Ct. Cl. at 441; *Wessel, Dural & Co.*, 129 Ct. Cl. at 465; *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 138 Ct. Cl. at 652 (1957)). See also *Hosseini v. United States*, 218 Ct. Cl. 727, 729 (1978) (declining to dismiss contract claim for \$250,000 because district court lacked subject matter jurisdiction). The *Brown* exception

concerned "the requirement of a 'final decision' contained in [42 U.S.C.] 405(g)," a requirement that "is not precisely analogous to * * * more classical jurisdictional requirements" because "[t]he term 'final decision' is not only left undefined by the Act but its meaning is left to the Secretary to flesh out by regulation." 422 U.S. at 766. Here, in contrast, the language of Section 1500 is clear.

therefore applied only when a plaintiff filed its claims in a court that clearly lacked subject matter jurisdiction.¹⁶

Petitioner, accordingly, cannot excuse its simultaneous litigation in multiple forums by invoking the *Brown* exception. The district courts clearly had jurisdiction over petitioner's tort claims. See 28 U.S.C. 1346(b) (vesting the district courts with exclusive jurisdiction over tort claims against the United States). Petitioner does not contend otherwise.

b. In any event, the court of appeals correctly held that *Brown* fundamentally misconstrued the language and purpose of Section 1500. The jurisdictional bar of Section 1500 "is not conditioned upon the question of whether the District Court had jurisdiction of the claim asserted by plaintiff therein." See *Frantz Equip. Co. v. United States*, 120 Ct. Cl. 312, 314 (1951). Rather, the language of Section 1500 provides that the Court of Federal Claims shall not have jurisdiction if there is a related "suit or process" in

¹⁶ It follows that petitioner's proposed construction is not entitled to *stare decisis* effect, and there is no basis for its argument that Congress may be presumed to have implicitly enacted it into law when it amended Section 1500 in 1982. See p. 25 & note 11, *supra*.

Petitioner also relies (Pet. Br. 35 n.18) on this Court's decision in *Pennsylvania R.R. v. United States*, 363 U.S. 202 (1960), for the proposition that the jurisdictional bar of Section 1500 may be waived. In that case, the Court simply noted that the Court of Claims had denied a motion to dismiss under 28 U.S.C. 1500, and "its action * * * is not challenged here." 363 U.S. at 204. That remark hardly can be read as a considered determination that the parties may waive the requirements of Section 1500.

another court. A suit or process in which it is determined that the court lacks jurisdiction is nevertheless a "suit or process."¹⁷

E. The Jurisdictional Bar Of Section 1500 Does Not Depend On The Order In Which A Plaintiff's Actions Are Filed

In its petition for certiorari, petitioners' principal argument (Pet. 9-12) was that the court of appeals erred in overruling *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), cert. denied, 382 U.S. 976 (1966). *Tecon* held that Section 1500 does not apply if the plaintiff files an action in the Court of Federal Claims before it files a related action in another court. See 343 F.2d at 946, 949. In its brief on the merits, petitioner appears to abandon its *Tecon* argument.¹⁸ In any event, *Tecon* does not provide a basis for jurisdiction over petitioner's claims.

1. The *Tecon* exception, like the *Casman* and *Brown* exceptions, would not apply in this case. When petitioner filed its first action in the Court of

¹⁷ In 1982, Congress solved the problem addressed in *Brown* by enacting 28 U.S.C. 1631. Section 1631 provides that whenever a federal court finds that it lacks jurisdiction in a civil action, it may transfer the action to any other court in which the action could have been brought, "and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred." See Pet. App. A17 (recognizing that *Brown* exception is no longer necessary).

¹⁸ See Robert L. Stern, Eugene Gressman & Stephen M. Shapiro, *Supreme Court Practice* § 13.8 (6th ed. 1986) ("A question set forth in a petition * * * will be considered abandoned if not reiterated and argued in the brief on the merits once review has been granted.").

Federal Claims, it had a third party complaint against the United States pending in the *Miller* litigation in Pennsylvania. And when petitioner filed its second action in the Court of Claims, it had an omnibus tort action against the United States pending in the Southern District of New York. See pp. 3-5, *supra*.

2. In any event, the court of appeals correctly rejected *Tecon*. Section 1500 provides that the Court of Federal Claims lacks jurisdiction over "any claim * * * in respect to which the plaintiff * * * has pending in any other court any suit or process." 28 U.S.C. 1500. Contrary to that clear statutory command, *Tecon* allowed the Court of Federal Claims to exercise jurisdiction even though a related action was pending in another court. As the court of appeals explained, "[a] case filed subsequent to a [Court of Federal Claims] complaint is clearly a 'pending * * * suit or process.'" Pet. App. A18.

That conclusion is confirmed by the original language of the statute, which provided that "no person shall file or prosecute any claim * * * for or in respect to which he * * * has pending any suit or process in any other court." 15 Stat. 77 (emphasis added). In addition, the original version of the statute allowed plaintiffs with actions pending in the Court of Claims 30 days to withdraw or dismiss suits "now pending in such other court." See 15 Stat. 77 (1868) (emphasis added). That provision was not limited to actions in other courts filed before the action in the Court of Claims.

The *Tecon* court erroneously relied on the fact that Senator Edmunds's bill barred litigation in the Court of Claims "for or in respect to" actions which the plaintiff "shall have commenced and has pending, or

shall commence and have pending." Cong. Globe, 40th Cong., 2d Sess. 2769 (1868) (emphasis added). The court of appeals correctly declined to attribute any significance to the omission of the highlighted phrase from the statute. As the Court explained:

Aside from the fact that there is no indication why section 8, as enacted, did not include this language, its deletion did not change the plain meaning of the statute.

Pet. App. A19. See note 5, *supra*.

3. *Tecon* allowed plaintiffs to engage in simultaneous litigation against the United States as long as the plaintiff took the simple precaution of filing first in the Court of Federal Claims. See 343 F.2d at 946, 949. The *Tecon* "exception" thus swallowed the rule of Section 1500. As a leading commentator has observed, "Section 1500 does not belong on the books if, as the result in *Tecon* would indicate, it may readily be evaded by the informed, and remains a trap only for those unfamiliar." Schwartz, *supra*, 55 Geo. L.J. at 597.

Tecon also conflicted with this Court's decision in *Corona Coal Co. v. United States*. In that case, the Court of Claims action was filed well before the district court action. See 263 U.S. at 539. The Court nevertheless held that the case "f[ell] within the terms of the statute," and declined to create any exception that would remove the apparent hardship created by the statute of limitations. *Id.* at 540.¹⁹

¹⁹ As the court of appeals noted, "[t]he facts underlying *Tecon* probably explain the court's desire to retain jurisdiction." Pet. App. A13. *Tecon* sued the United States in the Court of Claims seeking to recover taxes that it alleged had been erroneously collected. See *Tecon*, 343 F.2d at 944

F. The Courts Are Not Free To Disregard Clear Statutory Language To Avoid Harsh Results, And Section 1500 Is Not As Harsh As Petitioner And Its Amici Suggest

Petitioner contends (Pet. Br. 24-28) that the court of appeals' construction of 28 U.S.C. 1500 must be rejected because it is "out of harmony with the relevant legal landscape" and produces harsh results. Pet. Br. 25. The short answer to those contentions is that the courts "are not at liberty to add an exception [to clear statutory language] in order to remove apparent hardship." *Corona Coal Co. v. United States*, 263 U.S. at 540.

In any event, a statute barring simultaneous litigation of a single dispute with the government in multiple forums reflects a reasonable policy of discouraging wasteful and duplicative litigation in order to conserve public resources. That policy is far from outmoded. As the court of appeals observed:

[A] prohibition against suing the government simultaneously in multiple forums, and the likely inability to sue the government twice successively, are even more salutary in this day of excessive litigation than they were back in the Civil War era whence section 1500 comes.

n.1. "After much discovery, several pretrial conferences, and several trial postponements, [Tecon] filed the same claims in a district court and then moved the Court of Claims to dismiss * * * under section 1500." Pet. App. A13. The government—and the Court of Claims—viewed plaintiff's effort to divest the Court of Claims of jurisdiction by filing a second suit as unacceptable conduct. Although the government supported the result in *Tecon* at the time, further experience with Section 1500 has led us to conclude that the conduct in *Tecon* should be addressed by imposing sanctions for abuse of process and vexatious litigation. See, e.g., Fed. R. Civ. P. 11; 28 U.S.C. 1927.

Pet. App. A14-A15. Because it is easy to file a complaint in a civil lawsuit, and expensive to defend such suits, the court of appeals correctly observed that there is "no harm in requiring a party to carefully assess his claims before filing and choose the forum best suited to the merits of the claims and the applicable statute of limitations." *Id.* at A14.

Moreover, petitioner and its *amici* dramatically overstate the harshness of the statute. As an initial matter, many plaintiffs can obtain complete relief by bringing a single action against the United States.²⁰ If a plaintiff litigates what it perceives to be its best legal theory to a judgment on the merits and loses, it may well decide not to pursue its second-best legal theory in another court. If a plaintiff nevertheless wishes to pursue a second action, Congress has provided a relatively generous limitations period of six years for claims under the Tucker Act. See 28 U.S.C. 2501. In all but the most complex and protracted cases, it should be possible for a diligent plaintiff to complete litigation in another court and, if necessary, file an action in the Court of Federal Claims within the limitations period. We believe that these rules

²⁰ As noted above, Congress has eliminated certain specific hardships created by Section 1500. The hardship in *Brown* was eliminated by 28 U.S.C. 1631, which allows a federal court that lacks jurisdiction over a plaintiff's claims to transfer the claim to a court with jurisdiction. The case then proceeds as if it had been filed in the proper court. The hardship in *Casman* was eliminated by an amendment to 28 U.S.C. 1491 (a) (2) that permits a federal employee to seek both back pay and reinstatement in the Court of Federal Claims. In addition, Congress has provided that a plaintiff may bring certain contract and "takings" claims together with tort claims in the district court. See 28 U.S.C. 1346 (a) (2) (Little Tucker Act).

seldom will cause unwarranted hardship for plaintiffs. If such cases arise, however, equitable tolling of the statute of limitations may be available in some circumstances. See pp. 43-44, *infra*.

II. THE DOCTRINES OF NON-RETROACTIVITY AND EQUITABLE TOLLING DO NOT APPLY IN THIS CASE

A. Non-Retroactivity Is Inappropriate In This Case

Petitioner contends (Pet. Br. 43-45) that even if the court of appeals' decision is correct, it should be made "pure[ly] prospective." Pure prospectivity is inappropriate in this case, for several reasons.

1. Section 1500 limits the subject matter jurisdiction of the Court of Federal Claims. This Court has held on more than one occasion that "[a] court lacks discretion to consider the merits of a case over which it is without jurisdiction, and thus, by definition, a jurisdictional ruling may never be made prospective only." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 203 (1988), quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379-380 (1981). See also *Torres v. Oakland Scavenger Co.*, 487 U.S. at 317 n.3 (a court has no authority to waive a jurisdictional defect).²¹

Petitioner asserts (Pet. Br. 44) that this principle is inapplicable because the Court of Federal Claims

²¹ In *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 87-89 (1982), the Court held that its decision would apply only prospectively. In *Marathon*, the question was not whether the federal courts had exceeded a congressional grant of jurisdiction, but whether a congressional grant of jurisdiction was unconstitutional. The Court's opinion did not consider the argument that a jurisdictional holding cannot be made merely prospective.

has jurisdiction to decide "this type of case" (i.e., Tucker Act claims), while cases such as *Budinich* and *Firestone* were "wholly outside any grant of power to the court" and therefore the court "was effectively acting *ultra vires*." But there is no meaningful distinction between this case, on the one hand, and *Budinich* and *Firestone* on the other. *Budinich* and *Firestone* were diversity actions; there was no question that the court had jurisdiction to decide that "type" of case. In *Budinich*, the court lacked jurisdiction because the petitioner failed to file a timely notice of appeal. And in *Firestone*, the court lacked jurisdiction because there was no final order. If the court lacked discretion to overlook the jurisdictional defects in those cases, it plainly lacks discretion to overlook the jurisdictional bar of 28 U.S.C. 1500.²²

2. In any event, there is no basis for petitioner's suggestion that the decision in this case should not apply to petitioner. As an initial matter, a judicial decision that does not apply to the parties before the Court is in considerable tension with the "settled principle that this Court adjudicates only 'cases' and 'controversies.'" *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987), quoting U.S. Const. Art. III, § 2. See *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439, 2448 (1991) (opinion of Souter, J.) (declining to "speculate as to the bounds or propriety of pure

²² Petitioner's prospectivity argument is not supported by the rule that a final judgment in a contested action may not be collaterally attacked on the ground that the court lacked subject matter jurisdiction absent a "manifest abuse of authority" by the court. Restatement (Second) of Judgments § 12 (1982). That rule reflects principles of finality and repose in litigation that are not at issue here.

prospectivity"); see also *id.* at 2450 (opinion of Blackmun, J.) ("prospectivity, whether 'selective' or 'pure,' breaches [Court's] obligation to discharge [its] constitutional function"); *id.* at 2451 (opinion of Scalia, J.) ("both 'selective prospectivity' and 'pure prospectivity' [are] beyond [Court's] power").

Even if the three-part test of *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-107 (1971), were applicable in this case, petitioner would not be entitled to any relief. Although the court of appeals' decision overruled several judicial exceptions to Section 1500, none of those exceptions applied to petitioner's situation, let alone supplied a "clear past precedent" for petitioner's multiple simultaneous lawsuits against the United States. Indeed, the trial court dismissed petitioner's claims without breaking any new legal ground. Pet. App. E18-E26.

B. Equitable Tolling Is Inappropriate In This Case

Finally, petitioner contends (Pet. Br. 45-47) that the doctrine of equitable tolling should be applied to permit the Court of Federal Claims to exercise jurisdiction over its claims. Petitioner did not raise that issue in the courts below, and it was not considered by those courts. Accordingly, the Court should adhere to its usual practice and decline to address an issue not properly raised or decided in the courts below.

In any event, petitioner is not entitled to equitable tolling of the statute of limitations. In *Irwin v. Veterans Admin.*, 111 S. Ct. 453, 457 (1990), the Court held that the rebuttable presumption that equitable tolling is permissible in suits against private defendants also applies to suits against the United States. The Court noted that Congress "may provide otherwise if it wishes to do so." *Ibid.* We do not

contend that Section 1500 precludes equitable tolling of a statute of limitations in all circumstances.²³

In *Irwin*, the Court emphasized that “[f]ederal courts have typically extended equitable relief only sparingly,” in cases “where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period, or where the complainant has been induced or tricked by his adversary’s misconduct into allowing the filing deadline to pass.” 111 S. Ct. at 457-458. The Federal Circuit has been particularly reluctant to grant equitable tolling of the six-year limitations period under the Tucker Act. See *Catawaba Indian Tribe of South Carolina v. United States*, No. 92-5018 (Fed. Cir. Jan. 6, 1993), slip op. 15 (“[p]laintiff must either show that defendant has concealed its acts with the result that plaintiff was unaware of their existence, or it must show that its injury was ‘inherently unknowable’ at the accrual date”) (quoting *Japanese War Notes Claimants Ass’n v. United States*, 373 F.2d 356, 358-359 (Ct. Cl.), cert. denied, 389 U.S. 971 (1967)).²⁴

²³ In practice, it is possible that the interaction between the original version of Section 1500 and statutes of limitations prevented the cotton claimants from pursuing a second adjudication on the merits. Their claims were subject to a two-year limitations period. See *Johns-Manville Corp. v. United States*, 855 F.2d at 1561 n.7; *Mitchell v. Clark*, 110 U.S. 633 (1884) (two-year limitations period applied to actions against federal officials for seizure of property during the Civil War). By the time a cotton claimant completed an adjudication on the merits in one court, the statute of limitations may have barred a second action.

²⁴ That judicial reluctance is warranted in part because Congress exercises authority to grant equitable relief by en-

Here, petitioner has not contended that the government tricked it into allowing a filing deadline to pass. On the contrary, petitioner filed multiple actions prior to the filing deadline. Nor can petitioner argue that it is entitled to relief because it “actively pursued [its] judicial remedies” by filing not one but several lawsuits in different courts.²⁵ Equitable tolling certainly should not be available to a plaintiff—like petitioner—who consciously disregards Section 1500 by engaging in simultaneous litigation in the Court of Federal Claims and another court. Petitioner engaged in a campaign of simultaneous litigation seeking essentially identical relief based on essentially identical facts—the government’s alleged responsibility for injuries to workers exposed to asbestos while working in naval shipyards or on government contracts. Indeed, petitioner litigated identical takings claims simultaneously in the district court and the Court of Federal Claims. See pp. 3-5, *supra*.

acting private bills. Under its congressional reference authority, Congress refers proposed legislation to the Court of Federal Claims for findings of fact, “including facts bearing upon the question whether the bar of any statute of limitation should be removed.” 28 U.S.C. 2509(c). See also 28 U.S.C. 1492. One of the categories of relief provided by private legislation is waivers of statutes of limitations. See Note, *Private Bills in Congress*, 79 Harv. L. Rev. 1684, 1695-1696 (1966). Because Congress has an established method for granting equitable relief from statutes of limitations, the Court of Federal Claims is properly reluctant to grant such relief on its own.

²⁵ As explained above, petitioner’s simultaneous litigation would not have been permitted under any of the judicial exceptions to Section 1500 that were overruled by the court of appeals. Instead, petitioner is arguing for a dramatic expansion of those exceptions.

Petitioner chose to subject the government to multiple lawsuits despite a known risk that its actions in the Court of Federal Claims could be dismissed under Section 1500 as a result. Having made that choice, petitioner cannot convincingly maintain that equitable principles require relief in this Tucker Act case.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General

STUART M. GERSON
Assistant Attorney General

MAUREEN E. MAHONEY
Deputy Solicitor General

ROBERT A. LONG, JR.
Assistant to the Solicitor General

BARBARA C. BIDDLE
ROBERT M. LOEB
Attorneys

JANUARY 1993

DEC 9 1992

No. 92-166

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1992

KEENE CORPORATION, Petitioner,

v.

THE UNITED STATES, Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF AMICI CURIAE
C. ROBERT SUESS, LEO C. SHERRY, JR.,
RICHARD A. GREEN, IRVING ROBERTS, and
FOSTER, PAULSELL & BAKER, INC.

IN SUPPORT OF KEENE CORPORATION

Don S. Willner
Counsel of Record
Rebecca E. Swanson
WILLNER & ZABINSKY
Counsel for Amici Curiae
111 SW Front Avenue
Portland, OR 97204-3500
(503) 228-4000

Of Counsel:
Thomas M. Buchanan
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C.
20005-3502
(202) 371-5700

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IN SUPPORT OF KEENE CORPORATION

1. INTEREST OF THE AMICI CURIAE

Amici curiae are shareholders of Benj. Franklin Federal Savings & Loan Association ("Benj. Franklin"). They are plaintiffs in a pending suit filed in Claims Court in September, 1990, to recover the loss of their investment in

the association when it was taken over by federal regulators in February, 1990.

Amici represent approximately 5000 shareholders in that lawsuit, which is filed as a shareholders' derivative suit, and also contains class action allegations. The Federal Circuit Court of Appeals' interpretation of 28 U.S.C. § 1500(1988) ("Section 1500") in UNR Industries, Inc. v. United States, 962 F.2d 1013 (Fed.Cir. 1992), threatens to deprive the Claims Court of jurisdiction which up until now both parties believed to be established, and prevents the plaintiffs from preserving potential tort claims in the federal district court which they would pursue if unsuccessful in Claims Court. Amici therefore support petitioner Keene Corporation in its arguments for the reinstatement of the

Federal Circuit's panel decision, UNR Industries, Inc. v. United States, 911 F.2d 654 (Fed.Cir. 1990).

In this brief, amici curiae seek to bring to the Court's attention the particular facts of their case, in order to broaden the Court's perspective on the application of Section 1500 to individual cases. It is the intent of amici that this will highlight the unreasonableness of the Federal Circuit's interpretation of Section 1500, will assist the Court in fashioning a rule which is reasonable and workable in light of a wider variety of individual circumstances, and will prevent amici's claim from being jeopardized by inadvertent language in the Court's decision.

Benj. Franklin was a 65 year old savings and loan, the largest in the

Pacific Northwest. It was taken over by the Office of Thrift Supervision on February 21, 1990, as it was no longer in compliance with capital requirements following the passage of the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 183 (August 9, 1989), and implementing regulations. Benj. Franklin was placed in the conservatorship of the Resolution Trust Corporation until September 7, 1990, when its principal assets were sold to Bank of America.

Before the passage of FIRREA, Benj. Franklin had made a profit for sixteen consecutive calendar quarters, and was in compliance with all capital requirements. Federal regulators found no evidence of fraud or misconduct by the former

directors or management of the association. The association failed the new capital requirements because it was carrying a large amount of "goodwill" as a result of mergers earlier in the decade with other institutions which were failing. New regulations limited the amount of goodwill that could be accounted for as a capital asset, and reduced the period of time an institution could amortize the goodwill, despite agreements Benj. Franklin had entered into with federal regulators at the time of the mergers for the long-term treatment of goodwill.

As a result of the takeover, shareholders lost their investment in the association. Amici filed suit in the Claims Court on September 14, 1990 seeking \$181,000,000, the book value of

the shareholders' equity before passage of FIRREA. The name of the case is Suess, et al. v. United States, No. 90-981C. Since filing, approximately 2,600 shareholders have contributed financially to the lawsuit.

The complaint states both derivative and direct claims. Plaintiffs have alleged that the government breached its contract with the savings and loan when it abrogated its agreements for the treatment of goodwill, without which Benj. Franklin would not have entered into the mergers with the failing institutions. The government received the benefit of the agreements because it was relieved of enormous potential liability due to its insurance obligation to the depositors of the failing institutions. The complaint also states

Fifth Amendment claims for taking property without compensation, and taking property without due process of law.

The case is assigned to Chief Judge Smith of the Claims Court. He has ruled that the goodwill agreements are binding on the government in three other similar cases before him, and this issue is now before the Federal Circuit Court of Appeals on interlocutory appeal.

The government filed a motion to dismiss the Suess case on January 4, 1991. It raised primarily issues of shareholder standing, and whether the Claims Court could hear a shareholder derivative suit. The motion was argued on June 6, 1991, but is still under advisement.

Section 1500 potentially affects this case in the following way:

Immediately following the takeover of Benj. Franklin, its former directors filed suit in federal district court to have the conservator removed, pursuant to 12 U.S.C. § 1464(d)(2)(E), which provides for an exclusive remedy in the federal district court. They failed to obtain a temporary restraining order, but the case was still pending at the time the shareholders filed in Claims Court for damages for breach of contract, which is the exclusive jurisdiction of the Claims Court.

The government raised the issue of the earlier-filed case in its motion to dismiss, but conceded that under the settled law at that time, Section 1500 did not apply since different relief was

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sought in the district court case.¹ The government therefore only asked that the Claims Court case be stayed pending resolution of the district court case. The district court case was dismissed by mutual agreement of the parties in that case on January 31, 1991, and at oral argument on June 6, 1991, in the Suess case, the government conceded that portion of its motion.

Following the Federal Circuit's in banc decision in UNR Industries, the government has again raised the issue of the Claims Court's jurisdiction under

¹ "It is settled law that § 1500 does not bar a proceeding in this court, asking monetary relief, if the other pending suit seeks only affirmative relief such as an injunction or a declaratory judgment." Truckee-Carson Irrigation District v. United States, 223 Ct.Cl. 684, 685 (1980), citing Casman v. United States, 135 Ct.Cl. 647 (1956). Casman was overruled by the in banc decision in UNR Industries, 962 F.2d at 1022, fn. 3.

Section 1500. The shareholders have argued to the court that Section 1500 by its own terms does not apply, since the plaintiffs in the Claims Court case (shareholders) are not the same as the plaintiffs in the district court case (former directors). However, Benj. Franklin was named as a plaintiff in both cases. Jurisdiction may therefore turn on this point. If the Federal Circuit's in banc ruling in UNR Industries is affirmed, and the Claims Court determines there is an identity of parties, the shareholders will be denied their day in court, although they had nothing to do with the decision of others to bring the federal district court action in the first place.

Therefore, amici urge the Court to reinstate the Federal Circuit's panel

decision, UNR Industries, Inc. v. United States, 911 F.2d 654 (Fed. Cir. 1990), holding that jurisdiction exists if a Claims Court plaintiff's earlier-filed district court action is dismissed "before the Claims Court entertains and acts on a § 1500 motion to dismiss," 911 F.2d at 665-6.

If the Claims Court is found to be without jurisdiction of the shareholders' case, the shareholders believe they will still be able to refile, since the statute of limitations has not yet run. However, they anticipate there could be an argument that if Section 1500 requires "a party to carefully assess his claims before filing and choose the forum best suited to the merits of the claims and the applicable statutes of limitations," UNR Industries, Inc. v. United States,

962 F.2d at 1013, then the former directors, having once chosen to file in district court under an exclusive statute, have forever foreclosed the shareholders from filing in Claims Court under an equally exclusive statute. Amici therefore urge the Court to clarify that after a district court case is dismissed, the plaintiff may file a claim based on the same operative facts in Claims Court.

Furthermore, plaintiffs have potential tort claims against government agencies which cannot be filed in Claims Court. They filed tort claim notices, which were rejected. They are now fast approaching the deadline for filing these claims in federal district court. Under the in banc decision in UNR Industries, filing these claims timely in district

court would deprive the Claims Court of jurisdiction. Amici urge the court to adopt a rule of equitable tolling, as suggested in the additional views of Chief Judge Nies in UNR Industries, Inc v. United States, 962 F.2d at 1026, (Fed.Cir. 1992):

Where a party has possibly two claims for relief and is barred from asserting them concurrently by Section 1500, I do not believe the period allowed for bringing the additional or alternative claim should arbitrarily be cut off or even shortened. Section 1500 does not require such forfeiture.

Only by tolling the district court statute of limitations can the harm done to amici by the in banc decision in UNR Industries be undone.

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2. ARGUMENT

a. An earlier-filed district court case, which is dismissed before the Claims Court considers or acts on a Section 1500 motion to dismiss, should not deprive the Claims Court of jurisdiction.

The procedural facts of the case in which amici are plaintiffs highlight the reasonableness of the rule endorsed by the panel decisions in UNR Industries, and by Judge Plager in his dissenting opinion in the in banc decision, and the unreasonableness of the rule adopted by the court in its in banc decision.

If it is determined by the Claims Court that the plaintiffs are the same in both cases, and that the Claims Court case, filed by the shareholders while the directors' case was still pending in

district court, must therefore be dismissed under the in banc opinion in UNR Industries, the shareholders can probably simply turn around and refile the same complaint in Claims Court, though they may lose years of standing on the court's calendar. Their limitations period has not yet expired, and the directors' suit has long since been dismissed. This seems a pointless exercise, one that could not have been intended by Congress when it enacted or reenacted Section 1500, and hardly

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further the purpose of Section 1500.²

If, instead, the panel opinion rule is adopted, and the focus is on claims pending at the time the Claims Court entertains and acts on the Section 1500 motion to dismiss, the Claims Court case would not be dismissed in the first place.

In other words, the in banc opinion rule arbitrarily operates to penalize plaintiffs whose limitations periods have run on their claims, probably because they are further along in litigation, while it only causes additional cost and

² Compare, Brown vs. United States, 358 Fed. 1002, 1005 (Ct.Cl. 1966) (overruled by in banc decision, UNR Industries, Inc. v. United States, 962 Fed. at 1022): "The plaintiffs could undoubtedly file a new petition, without any bar through Section 1500; it does not seem fair or make sense to insist that that must be done -- with the limitations difficulties it may well entail."

delay to those who are not yet time-barred from refileing. This anomalous result is completely cured by the reasoning and rule of the panel decision.

b. The Claims Court should not lose jurisdiction of a case due to the later filing of a case in district court.

The in banc decision in UNR Industries states that Section 1500 requires a party "to carefully assess his claims before filing and choose the forum best suited to the merits of the claims and the applicable statute of limitations." 962 F.2d at 1021. This is a reasonable rule, but when coupled with the rule also embraced by that decision that the later filing of a claim in another court divests the Claims Court of jurisdiction, it operates not only to deprive plaintiffs of potentially

meritorious claims against the United States which cannot be brought in Claims Court, but discourages them from filing claims involving unsettled issues of law in the Claims Court, and puts them at the mercy of the court's calendar. This rule should at least be ameliorated by the doctrine of equitable tolling, to prevent plaintiffs from losing their day in court through no fault of their own.

In their Claims Court suit, amici are faced with challenges both to their standing under a federal statute, and to the ability of the Claims Court to hear a shareholder derivative suit. Both issues appear to be of first impression in the Claims Court, and the government's motion to dismiss, argued over 17 months ago, is still under advisement.

Meanwhile, the statutes are running

on claims amici would pursue in district court if it is determined they cannot proceed in Claims Court. It is possible that one day or one year after the statute of limitations expires, the Claims Court will rule that shareholders cannot proceed in that court. Under the in banc decision in UNR Industries, the shareholders will then have no recourse and no remedy, without ever having a decision on the merits of their claim. By the same token, if they ultimately lose on the merits of their claim in Claims Court, they would be time-barred from pursuing claims in district court.

Amici are thus at the mercy of the court's calendar, over which they have no control, and which cannot be realistically assessed in making the decision where to file. If their efforts

to establish their right to proceed on the merits in Claims Court fail, they will also have forfeited, as a result of the in banc decision in UNR Industries, their right to pursue alternative claims in district court, absent a rule of equitable tolling.

Moreover, if the Claims Court determines that any of the shareholders' claims sound in tort (as may be the case where shareholders have alleged breach of fiduciary duty and arbitrary and capricious conduct on the part of the agencies), the in banc decision deprives the Claims Court of its power under 28 U.S.C. § 1631 to transfer the claims to district court in the interest of justice. See, Cavin v. United States, 956 F.2d 1131 (Fed. Cir. 1992), where the Federal Circuit held the Claims Court had

properly refused to transfer claims sounding in tort to district court, since the plaintiffs had failed to timely appeal the administrative denials of the tort claims to district court.³ This is a real Catch-22 situation for amici.

This Court has recently held in Irwin v. Veterans Admin., ___ U.S. ___, 111 S.Ct. 453 (1990) reh'g denied, ___ U.S. ___, 111 S.Ct. 805 (1991), that equitable tolling may be available against the government. Chief Judge Nies and Judge Plager of the Claims Court have

³ The Federal Circuit based its decision in part on the fact that the Claims Court had advised the plaintiffs to file these claims in district court to preserve them, and plaintiffs had failed to do so. This decision was rendered in February, 1992. Under the Federal Circuit's in banc decision in UNR Industries, rendered two months later in April, 1992, plaintiffs could not have preserved their claims in district court without losing the jurisdiction of the Claims Court.

both suggested that equitable tolling should be available to the Claims Court. Amici, who are faced with a statute of limitations in district court, urge this court to hold that when Section 1500 prevents plaintiffs from filing claims against the government within the applicable statute of limitations period, that period should be equitably extended.

The purpose of Section 1500 is to protect the United States from having to defend itself simultaneously against suits in two forums brought by the same plaintiff involving the same facts. UNR Industries, Inc. v. United States, 962 F.2d at 1021; UNR Industries, Inc. v. United States, 911 F.2d at 663. Allowing a plaintiff to pursue a claim in Claims Court to its conclusion, meanwhile timely filing in district court claims which can

be stayed pending resolution of the Claims Court case, serves this purpose and is consistent with the language and purpose of Section 1500. UNR Industries, Inc. v. United States, 962 F.2d at 1030 (Plager, J., dissenting); Tecon Engineers, Inc. v. United States, 343 F.2d 943 (Ct.Cl. 1965), cert. denied 382 U.S. 976 (1966). If the Court reinstates this rule, however, it will be too late for these amici, whose time limits in district court will have expired. Amici therefore urge the court to establish that the doctrine of equitable tolling allows plaintiffs such as amici to file claims in district court at the conclusion of their case in Claims Court, despite intervening statutes of limitations.

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3. SUMMARY OF ARGUMENT

a. Section 1500 does not require that the Claims Court be deprived of jurisdiction when the same claim was pending in district court at the time the Claims Court case was filed, if it was dismissed before the Section 1500 motion was considered by the Claims Court. The "bright line" rule adopted by the in banc decision in UNR Industries does not further the purpose of Section 1500 to protect the United States from having to defend duplicative lawsuits simultaneously in different forums, and may lead to anomalous and unfair results. The rule of the panel decision in UNR Industries would deprive the Claims Court of jurisdiction only if there is a case pending in another court at the time the Claims Court entertains or acts on a

Section 1500 motion to dismiss. This rule is consistent with the language and purpose of Section 1500, and avoids such unnecessary results.

b. Section 1500 does not require that the Claims Court lose jurisdiction if a plaintiff later files a claim in district court involving the same operative facts. Such a rule does not further the purpose of Section 1500 to prevent duplicative litigation against the United States, when the district court case can be stayed pending resolution of the Claims Court case. It penalizes a plaintiff who may have additional claims that cannot be brought in Claims Court, and puts the plaintiff at the mercy of the Claims Court calendar, while statutes of limitations on potential district court claims run.

To prevent unfairness to plaintiffs like amici, who have been required to let district court statutes of limitations run under the coercion of the in banc decision in UNR Industries, the court should adopt a rule of equitable tolling, so that a plaintiff will not be time-barred from filing district court claims at the conclusion of a Claims Court case.

4. CONCLUSION

For the foregoing reasons, amici curiae urge the Court to reinstate the panel opinion in UNR Industries, Inc. v. United States, 911 F.2d 964 (Fed.Cir. 1990), and the rule of Tecon Engineers, Inc. v. United States, supra. As a necessary part of resolution of the same jurisdictional problem, amici moreover urge the court to adopt a rule of equitable tolling, so that a plaintiff's

time limitations for filing in district court may not expire while a case involving the same facts is pending in Claims Court.

Respectfully submitted,

Don S. Willner

Don S. Willner
Counsel of Record
Rebecca E. Swanson
WILLNER & ZABINSKY
Counsel for Amici Curiae
111 SW Front Avenue
Portland, OR 97204-3500
(503) 228-4000

Of Counsel:
Thomas M. Buchanan
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C.
20005-3502
(202) 371-5700

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No. 92-166

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

Keene Corporation,

Petitioner,

v.

United States,

Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

**BRIEF OF
DEFENDERS OF PROPERTY RIGHTS
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

Nancie G. Marzulla
President and Chief Legal
Counsel
6235 33rd Street, NW
Washington, DC 20015-2405
202/686-4197

Counsel for *Amicus Curiae*

December 10, 1992

**DEFENDERS OF PROPERTY
RIGHTS**

QUESTIONS PRESENTED

1. Whether the decision below violates both the plain language and the purpose of the Tucker Act.
2. Whether a jurisdictional statute which deprives a property owner of the right to seek just compensation whenever a suit for declaratory or equitable relief is filed violates the fifth amendment.

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No. 92-166

In the
SUPREME COURT OF THE UNITED STATES
October Term, 1992

Keene Corporation,

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On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

**BRIEF OF
DEFENDERS OF PROPERTY RIGHTS
AS AMICUS CURIAE
IN SUPPORT OF PETITIONER**

Pursuant to Rule 37.3 of the Rules of this Court, Defenders of Property Rights submits this brief *amicus curiae*. The *amicus* supports reversal of the decision by the United States Court of Appeals for the Federal Circuit.

INTEREST OF AMICUS CURIAE

Defenders of Property Rights is a non-profit, public interest legal foundation dedicated to the preservation of constitutionally-protected private property rights. The members of Defenders of Property Rights are property

owners and other beneficiaries of the rights protected by traditional Anglo-American property law. Incorporated under the laws of the District of Columbia, Defenders of Property Rights is designed specifically for the purpose of participating in legal actions affecting the public interest and the private property rights of its members. Defenders of Property Rights engages in litigation around the nation on behalf of its members in defense of property interests protected against government incursion by the Bill of Rights. Because the Court of Federal Claims is the only court with jurisdiction to hear claims for just compensation against the federal government for the taking of private property, the interests of Defender's membership will be adversely affected if the decision below, which restricts the ability of the Court of Federal Claims to hear these claims, is not reversed.

STATEMENT OF THE CASE

Amicus Curiae adopts the Statement of the Case as presented by the Petitioner.

SUMMARY OF ARGUMENT

The just compensation clause of the fifth amendment contains the only express money damages remedy in the Constitution. Recognizing the unique nature of this explicit guarantee, that government will not take private property for public use without providing compensation to the owner for that taking, this Court has on more than one occasion rejected attempts to limit or curtail this clause. In *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), this Court rejected the California rule which limited the property owner to a claim for invalidation for an unconstitutional taking, holding that "claims for just compensation are grounded" in and thus required by "the Constitution itself." *Id.* at 315. The *First English* Court explained that invalidation alone without just compensation is an inadequate remedy under the fifth amendment because "the Constitution . . . dictates the

remedy for interference with property rights amounting to a taking." *Id.* at 316 n. 9.

Moreover, this Court has also recognized that the explicit nature of the unconstitutional taking remedy is "self-executing" meaning that "statutory recognition [of the right to just compensation is] not necessary." *Jacobs v. United States*, 290 U.S. 13, 16 (1933). As explained by the *Jacobs* Court:

The form of the remedy [does] not qualify the right. It rest[s] on the fifth amendment. . . . A promise to pay [is] not necessary. Such a promise [is] implied because of the duty to pay imposed by the Amendment.

Id.

The decision of the court below, *UNR Industries, Inc. v. United States*, 962 F. 2d 1013 (Fed. Cir. 1992) (*en banc*), attempts to qualify the unconditional right to just compensation by requiring that a claimant make an election between the invalidation remedy, which may only be sought in district court, and the just compensation remedy, which may only be sought in the Court of Federal Claims.

Such a reading of the Tucker Act would render it unconstitutional because it truncates the legal process to which a property owner is entitled under the fifth amendment. Fortunately, a literal reading of the Tucker Act does not contravene the Constitution because the Act limits the Court of Federal Claims' jurisdiction to suits for money damages for an unconstitutional taking only if the same "claim" (*i.e.*, for money damages for the same unconstitutional taking) is pending in another court.

ARGUMENT

I. The Decision Below Misinterprets The Meaning Of the Statute and Perverts Its Purpose

In determining the jurisdiction of the Court of Federal Claims, the court below read Section 1500 of the Tucker Act to divest the court of jurisdiction over claims "which are based on the same underlying facts" and which "are pending." The effect of this overly-broad reading of the Tucker Act is to bar the filing of different claims in both the Court of Federal Claims and a federal district court, even though such claims are based on different legal theories and seek different forms of relief. This misreading of the meaning and the purpose of the Tucker Act raises acute constitutional concerns in the area of fifth amendment litigation.

Unlike most judicial state systems, the federal system divides the jurisdiction to decide fifth amendment claims between two separate courts. 28 U.S.C. §1331 provides that all questions under the Constitution and laws of the United States be decided in federal district courts. The Tucker Act allocates all constitutional claims against the United States for money damages greater than \$10,000 not founded on tort to the Court of Federal Claims. The Tucker Act provides, in pertinent part:

The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. §1491 (a)(1).

Thus, a property owner with a claim for just compensation

under the fifth amendment must decide whether he will pursue his rights in one or more federal courts because no single court has broad enough jurisdiction to grant both monetary and equitable relief. To the extent that a property owner desires to invalidate the government's action, relief which is equitable in nature, his choice of necessity will be the federal district court. On the other hand, if the property owner desires to be compensated for the amount of money lost due to the regulation or other governmental act, the claimant's remedy will lie in the Court of Federal Claims exclusively. If, however, the owner wishes to seek injunctive relief against the government action and at the same time seek compensation for the value of his property already taken, he must bring separate suits, one in the Federal District Court and the other in the Court of Federal Claims.¹

A. The Meaning of the Statute Is to Limit the Jurisdiction of the Court of Federal Claims Only When a Claim For Money Damages is Pending In Another Court and Would Be Cognizable in the Court of Federal Claims

The meaning of Section 1500 is evident from the text which states that:

The United States Claims Court shall not have jurisdiction of any claims for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States. . . at the time when the cause of action

¹ For an example of a property owner entitled to this dual remedy, see the decision on remand of *Lucas v. South Carolina Coastal Council*, No. 23342, slip op. (S. Car. S. Ct. Nov. 20, 1992), decided by this Court on June 29, 1992. (505 U.S. ___, 112 S. Ct. 2886 (1992)) On remand the South Carolina Supreme Court granted both equitable relief as to the property owner and awarded him damages for the time during which the regulation took the beneficial uses of his property in violation of the fifth amendment.

alleged in such suit or process arose . . .

28 U.S.C. §1500 (1988).

As this Court once observed upon an earlier review of Section 1500, "the words of the statute are plain, with nothing in the context to make their meaning doubtful . . ." *Corona Coal Co. v. United States*, 263 U.S. 537, 540 (1924). The meaning of Section 1500 is to bar plaintiffs from bringing a claim cognizable in the Court of Federal Claims, *i.e.*, a claim for money damages against the United States, if that claim is pending in another court.

The court below perverted this language to bar claims based on the same underlying facts: "[T]hat the word 'claim' does not refer to a legal theory, contrary to appellants' arguments, but to a set of underlying facts, comports with the language and history of Section 1500." *UNR Industries, Inc. v. U.S.*, 962 F. 2d at 1023. The court below further held that all such claims were barred irrespective of when they were filed by defining "has pending" to mean at any time during the pendency of the action: "[I]f the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction" or "if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction." *Id.* at 1021.

By defining the key terms of Section 1500 in this manner, the court below was able to conclude that the tort claim filed by the Petitioner in the district court is the same as the government contract claim or the taking claim filed in the Court of Federal Claims, despite the fact that the tort claim could never have been filed in the Court of Federal Claims. In short, under the ruling below, the filing of a claim in district court for wholly different relief, premised upon an entirely different legal theory (and, which would not even be cognizable in the

Court of Federal Claims), *ipso facto* extinguishes the constitutional right to recover just compensation in the Court of Federal Claims.

The decision below further misapprehends the fact that the suit for declaratory relief is very different from the suit for just compensation. A suit for declaratory relief in district court focuses sharply upon the importance of the governmental action and the extent to which its governmental purpose is substantially advanced in the particular case, in order to arrive at a judgment as to whether this exercise of public power should be thwarted. *See, e.g., Preseault v. I.C.C.*, 494 U.S.1 (1990), where the district court upheld the exercise of governmental authority and sent the property owner to the Claims Court for just compensation.

In contrast, the takings suit in the Court of Federal Claims closely examines the economic impact of the regulation and the reasonable expectations of the owner to determine whether the concededly valid exercise of sovereign power has triggered the right to monetary relief. Thus, while both lawsuits are based upon the just compensation clause of the fifth amendment of the Constitution, a claimant may prevail in one court and lose in another, both decisions being faithful to the dictates of the Constitution. *See, e.g., Loveladies Harbor, Inc. v. Baldwin*, No. 82-1948 [22 ERC 1055] (D.N.J. Mar. 12, 1984) (unpublished), *aff'd without opinion*, 751 F. 2d 376 [22 ERC 1055] (3d Cir. 1984) (upholding the validity of the denial of the wetlands permit) and *Loveladies Harbor, Inc. v. United States*, No. 91-5050 (Fed. Cir.) (awarding the property owner just compensation); *see also Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160 (1985), *reversed on other grounds*, 791 F. 2d 893 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 1054 (1987), *on remand*, 21 Cl. Ct. 161 (1990).

B. The Purpose of Section 1500 Supports Its Meaning

The legislative purpose of Section 1500 is clear: Congress

was attempting to address problems concerning the lawsuits of claimants who had had their property, chiefly cotton, seized and used by the government for Civil War purposes. The proceeds from the sale of much of this cotton had been deposited in the federal Treasury but, after the war and upon proof of ownership and loyalty to the Union, the claimant could recover the proceeds applicable to the sale of his cotton. Prior to the days when the doctrine of *res judicata* would preclude such an anomalous result, many cotton claimants figured out a way of bettering the odds of winning their lawsuit by getting "two bites at the apple": file suit in both the Court of Claims and state or federal district courts. In the end, the government was often forced to defend the identical suit in different forums and, perhaps, to pay the same claimant twice. Section 1500 was designed to put an end to this practice:

The object of [Section 1500] is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims.

81 Cong. Globe, 40th Cong. 2d Sess. 2769 (1868), *quoted in UNR Industries, Inc. v. United States*, 962 F. 2d at 1018.

Since that time, however, development of the modern doctrine of *res judicata* largely achieves the purposes of Section 1500 intended by its original sponsors. By shrinking the jurisdictional reach of Section 1500 the court below thwarts the purposes of the statute by actually depriving property owners of any opportunity to bring a

legitimate just compensation claim, even when that claim has never been litigated (and cannot be litigated) in any other forum.

II. The Decision Below Unconstitutionally Burdens the Claimant's Right To Seek Just Compensation

The practical impact of the opinion below is to complicate greatly the ability of a property owner to vindicate his right to just compensation for a governmental action that has caused a physical or a regulatory taking. First, he is forced to elect between declaratory and equitable relief on the one hand or recovery of the value of the property taken on the other, since the court below would deem the second claim to be the same as the first. This election is further complicated by the common government litigation strategy known as the "Tucker Act Shuffle," in which the government urges dismissal of the district court suit on the grounds that the plaintiff should seek just compensation in the Court of Federal Claims, and urging dismissal of the Court of Federal Claims suit on the grounds that the plaintiff should seek invalidation in the district court.²

Second, should the property owner elect to sue in district court, he runs the risk that the six-year statute of limitations

² For an example, see *Preseault v. I.C.C.*, 494 U.S.1 (1990). In that case, the property owner filed suit in district court challenging the validity of the National Trails System Act, 16 U.S.C. §1247 (d), as an unconstitutional taking under the fifth amendment. The Court, however, sent claimant to the Claims Court reasoning that the Tucker Act, unless specifically repealed, was available. The Court further held that invalidation could not be granted until the claimant had exhausted the Tucker Act process.

will expire during the pendency of this litigation.³ Tucker Act, 28 U.S.C. §2501. Because the statute of limitations is an express limitation on the Tucker Act's waiver of sovereign immunity, it is jurisdictional and must be strictly construed. *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990); *Schmidt v. United States*, 3 Cl. Ct. 190, 192 (1983).

Third, should the property owner decide to forego his right to seek equitable relief against the government's physical or regulatory intrusion upon his property rights and sue for just compensation in the first instance, he runs the risk that the government will allege that his claim is unripe because the regulatory application has gone unchallenged. See, e.g., *Florida Rock Industries, Inc. v. United States*, 8 Cl. Ct. 160 (1985). Should the government succeed, the plaintiff may be forced to undergo years of fruitless litigation regarding the validity of the governmental action only to return to the Court of Federal Claims after an additional

³ Judge Plager accurately describes in his dissent the uncertainty facing litigants when deciding the appropriate court in which to file their lawsuit: "[T]he Government's theory fails because it too early cuts off the recourse of litigants who, either because of subject matter or other circumstances, may be found entitled to pursue their claims only in the Claims Court, and who would not otherwise violate the policy behind §1500. The facts of the present case offer a good example. UNR had third-party complaints against the Government pending in federal district court. Unsure of whether the district court had jurisdiction, and facing a running of the statute of limitations, UNR filed the same claim in the Claims Court. By the time the Claims Court entertained and acted on the Government's §1500 motion, UNR had no earlier-filed suits pending and had yet to have its day in court. I believe the statute was not intended to operate to preclude UNR from having its day." *UNR Industries, Inc. v. U.S.*, 962 F. 2d at 1028-29 (Plager, J., dissenting).

lengthy deprivation of his property rights.⁴

Finally, the court below implies that since the district court claim and the Court of Federal Claims claim are the same, the decision of the district court may be *res judicata* as to the Court of Federal Claims action: "[I]f the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of *res judicata* and available defenses apply." *UNR Industries, Inc. v. U.S.*, 962 F. 2d at 1028-29. This conclusion is plainly wrong for it would contradict the holdings in cases such as *Nixon v. United States*, No. 92-5021 (D.C. Cir. Nov. 17, 1992); *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), *appeal filed*, No. 91-5050 (Fed. Cir. argued Nov. 1991); and, *Whitney Benefits, Inc. v. United States*, 962 F. 2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (Nov. 4, 1991), where the district court upheld the regulation but just compensation was nevertheless subsequently awarded.

Thus, the decision below accomplishes the result which this Court ruled unconstitutional in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987), by virtually eliminating the right to seek just compensation if the claimant first chooses to sue

⁴ Such delay can in itself violate the due process clause of the fifth amendment. This Court recognized as early as 1926 that "long-continued and unreasonable delay" by an agency may quite effectively take property in violation of due process. *Smith v. Illinois Bell Telephone Co.*, 270 U.S. 587, 591 (1926); see also *Armstrong v. Manzo*, 380 U.S. 545 (1965) (no lawful reason for delays not related to legitimate governmental purpose or function).

for invalidation.⁵ In *First English, supra*, this Court held that the California rule which limited relief for an unconstitutional taking to invalidation of the regulation was constitutionally insufficient. This Court held that the Constitution required yet another remedy, the right to seek just compensation, in addition to the right to seek invalidation.

The *First English* Court reached this result because the remedy afforded by the Constitution for unconstitutional taking of private property is extraordinary. Representing the only express guarantee for money damages in the Constitution, this Court has held that an aggrieved property owner need not look to a statute or other legislative authorization in order to obtain the remedy of just compensation to which he is entitled. *First English, supra*; *United States v. Clarke*, 445 U.S. 253, 257 (1980).

As Justice Brennan explained in his dissenting opinion in *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981): "This Court has consistently recognized that the just compensation requirement in the fifth amendment is not precatory: once there is a 'taking,' compensation *must* be awarded." *Id.* at 654 (emphasis in original). Justice Brennan further warned that "the applicability of express constitutional guarantees is not a matter to be determined on the basis of policy judgments

⁵ Indeed, that the decision below eliminates the right to seek just compensation is reinforced by the government's motions to dismiss the claims for just compensation now pending in the Court of Federal Claims in *Whitney Benefits, Inc. v. United States*, 962 F. 2d 1169 (Fed. Cir.), *cert. denied*, 112 S. Ct. 406 (Nov. 4, 1991) (§1500 motion to dismiss based upon the fact that the Plaintiff had pending an action for injunction to enforce the coal exchange program under Surface Mining Control and Reclamation Act at the time the taking suit was filed) and in the Federal Circuit in *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), *appeal filed*, No. 91-5050 (Fed. Cir., argued Nov. 1991) (§1500 motion to dismiss based upon fact that at time the taking claim was filed Plaintiff also had a claim in district court challenging the validity of a §404 wetlands permit denial).

made by the legislative, executive or judicial branches." *Id.* at 661.

The most useful analysis of the powerful reach of the just compensation guarantee is contained in *Jacobs v. United States*, 290 U.S. 13 (1933). In *Jacobs*, the Court reversed a lower court's decision which held that interest was not recoverable on a property owner's claim for just compensation because the statute under which suit was brought did not authorize the payment of interest. The *Jacobs* Court rejected the lower court's conclusion that one's constitutional rights to full just compensation could be limited to statutory authorization:

This ruling cannot be sustained. The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. That right was guaranteed by the Constitution . . . The form of the remedy did not qualify the right. It rested upon the fifth amendment. Statutory recognition [of the right to interest] was not necessary. . . . The suits were . . . founded upon the Constitution of the United States

Id. at 16-17 (citations omitted).

The *Jacobs* Court recognized, as did Justice Brennan, that the right to just compensation cannot be taken away or qualified by statutory whim. Yet the ruling of the court below limits a claimant's rights to just compensation by requiring that he choose between equitable and declaratory relief and just compensation. There is no constitutional authorization for this impairment of the constitutional rights to just compensation.

Given the explicit nature of the just compensation clause remedy and the long history of this Court's decisions which have maintained the vitality of the fifth amendment against attempts to limit it by governmental legislation or other acts,

it would seem firmly established that burdening or extinguishing this right is constitutionally impermissible. Likewise, to conclude, as the court did below, that a constitutional right to just compensation can now be burdened by statute is equally impermissible.

CONCLUSION

The fifth amendment to the United States Constitution provides an explicit remedy for money damages whenever private property is taken for public use: "nor shall private property be taken for public use without just compensation." U.S. CONST. amend. v. To secure this remedy afforded by the Constitution, claimants must file an action in the Court of Federal Claims, the only court with jurisdiction to award money damages against the United States.

However, the decision below eliminates the right of a claimant to seek just compensation whenever a suit for declaratory or equitable relief is filed in the district court. Consequently, the decision below complicates even further an already complex process of litigating a takings claim by requiring the sequencing of filings and exacerbating the effect of the "Tucker Act shuffle."

The fifth amendment, however, recognizes no exception to its guarantee. Because the decision below either eliminates or excessively burdens the right to just compensation, the ruling is incorrect and must be reversed.

Respectfully submitted,

Nancie G. Marzulla
President and Chief Legal
Counsel
6235 33rd Street, NW
Washington, DC 20015-2405
202/686-4197

Counsel for *Amicus Curiae*

DEFENDERS OF PROPERTY
RIGHTS

December 10, 1992

DEC 10 1992

No. 92-166

OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

KEENE CORPORATION,
Petitioner,
v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

**BRIEF OF DICO, INC. AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

CHARLES F. LETTOW *
MICHAEL R. LAZERWITZ
MICHAEL A. MAZZUCHI
CLEARY, GOTTLIB, STEEN &
HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

* *Counsel of Record for
Amicus Curiae Dico, Inc.*

December 10, 1992

QUESTION PRESENTED

Whether the court of appeals erred in addressing and overruling the interpretation of 28 U.S.C. § 1500 set forth in *Casman v. United States*, 135 Ct. Cl. 647 (1956), which enables claimants against the United States to proceed in two courts simultaneously, where each court has separate jurisdiction to provide a discrete part of the relief which is afforded and available.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-166

KEENE CORPORATION,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the
 United States Court of Appeals
 for the Federal Circuit

BRIEF OF DICO, INC. AS *AMICUS CURIAE*
 IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE*

Dico, Inc. ("Dico") respectfully submits this brief as *amicus curiae* in support of petitioner Keene Corporation.¹

¹ Petitioner and respondent, the United States, have consented to the filing of this brief *amicus curiae* in support of petitioner. Their letters of consent have been presented to the Clerk under Rule 37.3 of the Rules of this Court.

Dico has a particular interest in the so-called *Casman* interpretation of 28 U.S.C. § 1500, which addresses the circumstance where a claimant against the United States is faced with jurisdictional statutes which provide that part of the relief available must be obtained in a district court and part must be sought in the Claims Court.² *Casman v. United States*, 135 Ct. Cl. 647 (1956), and its progeny construe 28 U.S.C. § 1500 to allow these discrete segments of the available relief to be sought concurrently in the pertinent courts, as long as there is no overlap. Although the Federal Circuit in the case below was not presented with the *Casman* fact pattern, it reached out explicitly to overrule *Casman* and the cases which follow it. *UNR Industries, Inc. v. United States*, 962 F.2d 1013, 1022 n.3 (Fed. Cir. 1992); Pet. App. A17 n.3.

Since 1986, Dico has been required, under a unilateral order issued by the United States Environmental Protection Agency ("EPA"), to capture and treat a source of groundwater contamination which EPA knows Dico did not create. Dico has petitioned EPA for reimbursement for the costs of the ongoing remedy under 42 U.S.C. § 9606(b)(2), which specifically authorizes such relief. EPA, however, denied Dico's petition, concluding that the statute does not apply to costs stemming from orders issued before the date of the statute's enactment, even if the order is modified and all the cleanup costs are incurred after that date.

² On October 29, 1992, President Bush signed into law the Federal Courts Administration Act of 1992, Pub. L. No. 102-572, 106 Stat. 4506 ("FCAA"), which provides that the Claims Court is to be renamed the "United States Court of Federal Claims." The FCAA will not become effective until January 1, 1993. See FCAA § 1101(a), 106 Stat. 4524. For clarity, Dico will continue to refer to the "Claims Court" throughout this brief. None of the substantive provisions of the FCAA are relevant to the arguments presented here.

The statute provides that if EPA rejects a reimbursement petition under Section 9606(b)(2), the petitioner may "within 30 days of receipt of such refusal file an action against the President in the appropriate United States district court seeking reimbursement." 42 U.S.C. § 9606(b)(2)(B). Dico timely filed such an action. *Dico, Inc. v. Diamond*, Civil Action No. 4-92-70375 (S.D. Iowa filed June 10, 1992). Dico also claims, however, that if Section 9606(b)(2) is held not to apply because EPA issued its order before that statute's enactment, then EPA's order constitutes both a deprivation of Dico's property without due process of law and a taking under the Fifth Amendment to the United States Constitution.

However, Dico's action against EPA for reimbursement can be brought only in district court. 42 U.S.C. § 9606(b)(2)(B). Dico's takings and due process damages claims exceed \$10,000 in amount, and thus can be brought only in the Claims Court. See 28 U.S.C. § 1491(a). Relying on the construction of 28 U.S.C. § 1500 set forth in *Casman*, see, e.g., *Boston Five Cents Sav. Bank v. United States*, 864 F.2d 137 (Fed. Cir. 1988), and seeking to insure that it did not sleep on its claims and could invoke the doctrine of equitable tolling if necessary, Dico brought suit in the Claims Court soon after it had filed its action in the district court. *Dico, Inc. v. United States*, No. 92-453 L (Cl. Ct. filed July 2, 1992). In light of the Federal Circuit's interpretation of Section 1500 in the case below, the United States filed a motion to dismiss that suit.³

Dico's predicament illustrates one of the many situations in which claimants against the United States necessarily must proceed in two courts to obtain relief, but will now be turned away from one if the Federal Circuit's reinterpretation of 28 U.S.C. § 1500 stands. See

³ That motion remains pending before the Claims Court.

tion 1500 need not—and should not—create such a litigation trap for claimants who must look for relief to segmented statutory jurisdictional routes enacted by Congress.

SUMMARY OF ARGUMENT

Section 1500, properly construed, provides that claimants against the United States may litigate simultaneously in the Claims Court and another court, where each court's jurisdiction extends to a separate part of the remedies to which the claimant is entitled. That construction of Section 1500, which has been set forth in decisions such as *Casman v. United States*, 135 Ct. Cl. 647 (1956), is sound and should remain good law.

In construing Section 1500 to prevent that otherwise reasonable and sensible result, the Federal Circuit misconstrued the terms of Section 1500, ignored the statute's limited purpose, and swept aside pertinent, long-settled precedents. Moreover, the court of appeals reached out to overrule *Casman* despite the fact that there was no need to do so. This Court should correct the court of appeals' unwarranted reinterpretation of Section 1500. In *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932), this Court ruled that Section 1500 should not be extended beyond its terms; that is what the Federal Circuit has done in the instant case.

Finally, if the Federal Circuit's construction of Section 1500 is to stand, it must be subject to a mitigating gloss to accommodate segmented jurisdictional avenues for relief. If 28 U.S.C. § 1500 is interpreted to bar access to the Claims Court for the period of time litigation is pending in federal district court, the doctrine of equitable tolling should apply to the portion of the relief which must be sought in the Claims Court.

ARGUMENT

I. THE COURT OF APPEALS ERRED IN ADDRESSING AND OVERTURNING THE CONSTRUCTION OF SECTION 1500 SET FORTH IN *CASMAN v. UNITED STATES*

The Federal Circuit here unnecessarily reached out to overturn the sound construction of Section 1500 set forth in a series of cases beginning with *Casman v. United States*, 135 Ct. Cl. 647 (1956), namely, that Section 1500 does not divest the Claims Court of jurisdiction where a party requesting money damages in that court simultaneously seeks equitable relief in a parallel proceeding. See, e.g., *Hosseini v. United States*, 218 Ct. Cl. 727 (1978); *Boston Five Cents Sav. Bank v. United States*, 864 F.2d 137 (Fed. Cir. 1988).⁴ That overturning of established precedent is particularly unwarranted where, as here, the so-called *Casman* rule was not at issue. As this Court has warned, a court

“is not empowered to decide . . . abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot affect the result as to the thing in issue in the case before it.”

Webster v. Reproductive Health Servs., 492 U.S. 490, 507 (1989) (quoting *Tyler v. Judges of Court of Registration*, 179 U.S. 405, 409 (1900)); see *United Pub. Work-*

⁴ Prior decisions of this Court addressing the different jurisdictional powers of the district courts and the Claims Court include: *Bowen v. Massachusetts*, 487 U.S. 879, 893-901 (1988) (district court jurisdiction proper over suit by state seeking reimbursement under Medicaid provisions; claim was not one for “money damages”); *Glidden Co. v. Zdanok*, 370 U.S. 530, 556-57 (1962) (opinion of Harlan, J.) (discussing the Tucker Act, 28 U.S.C. § 1491, and observing that “[f]rom the beginning [the Court of Claims] has been given jurisdiction only to award damages, not specific relief”); see also *School Comm. of Burlington v. Department of Educ.*, 471 U.S. 359, 370-71 (1985) (reimbursement of educational costs under Education of the Handicapped Act, 20 U.S.C. §§ 1401, *et seq.*, not “damages”).

ers v. Mitchell, 330 U.S. 75, 89-91 (1947); *United States v. Appalachian Power Co.*, 311 U.S. 377, 423 (1940); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 75 (1831).

In *Casman*, a discharged government employee sued in the Court of Claims for back pay and also filed suit in the district court for reinstatement. At that time, the Court of Claims could not grant reinstatement or similar equitable relief, and the district courts could not award back pay. The Court of Claims held that because “[t]he claim in this case and the relief sought in the district court are entirely different,” Section 1500 would not bar the simultaneous litigation. *Casman v. United States*, 135 Ct. Cl. 647, 649-50 (1956). As the court explained:

Since plaintiff has no right to elect between two courts, section 1500 . . . is inapplicable in this case. To hold otherwise would be to say to plaintiff, “If you want your job back you must forget your back pay”; conversely, “If you want your back pay, you cannot have your job back.” Certainly that is not the language of the statute nor the intent of Congress.

Casman, 135 Ct. Cl. at 650; see *Boston Five Cents Sav. Bank*, 864 F.2d at 139 (applying *Casman* rule to separate suit for declaratory relief).

In this case, by contrast, claimants in the consolidated actions before the court, although alleging different legal claims, each sought exclusively monetary relief. See, e.g., Pet. App. A2-A5, F1-F11, H1-H19. Consequently, the actions in the instant case did not implicate *Casman*.⁵

⁵ As a purported justification for reconsidering *Casman*, the court of appeals noted petitioner’s demand in the Claims Court for “relief different from its indemnification suit” in district court. See Pet. App. A22. Petitioner had argued that under *Casman* it should have been able to pursue a Fifth Amendment takings claim in the Claims Court, once the district court had dismissed that claim for lack of jurisdiction. See Pet. 16 n.6. In fact, petitioner’s argument relies not on *Casman*, but on another precedent constru-

II. THE CASMAN RULE IS CONSISTENT WITH THE LANGUAGE, CONTEXT, AND PURPOSES OF SECTION 1500

Despite the court of appeals’ assertions, the “plain language” of Section 1500 did not call for the court’s sudden and dramatic departure from established precedent. See, e.g., Pet. App. A17-A19. The Federal Circuit previously had acknowledged that “[t]he word ‘claim’ has no one meaning in the law.” *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1560 (Fed. Cir. 1988), cert. denied, 489 U.S. 1066 (1989). And Congress’s equating the word “claim” with “cause of action” in Section 1500 merely compounds the evident ambiguity. See *Johns-Manville*, 855 F.2d at 1560; *United Mine Workers v. Gibbs*, 383 U.S. 715, 722, 724 (1966) (“the meaning of ‘cause of action’ was a subject of serious dispute” when Federal Rules of Civil Procedure were adopted and remains “the source of considerable confusion”). In such circumstances, the appropriate construction of Section 1500 demands attention to the statute’s context as well as its legislative background and to established precedents that have resulted from applying the statute’s terms to concrete facts.

Commentators have pointed out that the “underlying reason” for Congress’s enactment of Section 1500

was the limited application of the rule of res judicata in suits against Government and against government officers. Without the section, as Senator Edmunds pointed out, the claimants could retry the issues in a second suit against the United States. This was possible because the judgment in the first suit against the government officer-agent would not be res judicata in the second suit against the United States. Accordingly, the election required by the statute has been

ing Section 1500, *Brown v. United States*, 358 F.2d 1002, 175 Ct. Cl. 343 (1966) (Section 1500 did not bar resumption in Court of Claims of claim dismissed by district court for lack of jurisdiction).

understood as designed only to provide a substitute for the absent rule of res judicata in successive suits against a government officer and against the Government.

D. Schwartz, *Section 1500 of the Judicial Code and Duplicate Suits Against the Government and its Agents*, 55 Geo. L.J. 573, 578 (1967) (footnote omitted).

This Court has long adhered to that interpretation of Section 1500. See *Matson Navigation Co. v. United States*, 284 U.S. 352 (1932). When this Court decided *Matson*, Section 154 of the Judicial Code, ch. 231, 36 Stat. 1138 (1911), the predecessor to Section 1500, divested the Court of Claims of jurisdiction only where the district court suit was against a person acting under the authority of the United States. See *Matson*, 284 U.S. at 355. The Court of Claims, however, had applied Section 154 to bar simultaneous suits against the United States itself, reasoning that Section 154's purpose was "to prevent the Government from being sued in separate jurisdictions on the same cause of action and to make the plaintiff elect in which court to sue." *Matson Navigation Co. v. United States*, 72 Ct. Cl. 210, 213 (1931).

This Court rejected the Court of Claims' interpretation of Section 154. The Court held that the purpose of Section 154 "was only to require an election between a suit in the Court of Claims and one brought in another court . . . in which the judgment would not be res adjudicata in the suit pending in the Court of Claims." *Matson*, 284 U.S. at 355-56 (emphasis added).

This Court's rationale in *Matson* accounts for the Court of Claims' decision in *Casman*. Quoting *Matson*, the Court of Claims stated that Section 1500 was intended only to "require an election between a suit in the Court of Claims and one brought in another court." *Casman*, 135 Ct. Cl. at 649 (quoting *Matson*, 284 U.S. at 356). In the circumstances before it, however, the Court of Claims reasoned that "the plaintiff obviously

had no right to elect between the courts," because "[t]he claim in this case and the relief sought in the district court are entirely different." *Casman*, 135 Ct. Cl. at 649-50. The court acknowledged a 1948 amendment to Section 1500,⁶ but noted that "the changes have no effect on the overall purpose of the section." *Casman*, 135 Ct. Cl. at 649 n.1. Following *Matson*'s directive against extending Section 1500 beyond its terms, the *Casman* court concluded that the plaintiff "does not have pending in any other court a suit 'for or in respect to' his claim for back pay." *Casman*, 135 Ct. Cl. at 650.

Casman thus reflects allegiance both to Congress' expressed purpose behind Section 1500, as reflected in the statutory text, and to this Court's precedents construing that statute. It is not properly labeled one of Section 1500's "judicially created exceptions and rationalizations," as the Federal Circuit did in the decision below. Pet. App. A14. That label implies a departure from language and purpose, which is not the case.

The *Casman* rule is also consistent with sound principles of judicial administration. Section 1500 is in derogation of the rule prevailing in other contexts that "where the jurisdiction of a court, and the right of a plaintiff to prosecute his suit in it, have once attached, that right cannot be arrested or taken away by proceedings in another court." *Donovan v. City of Dallas*, 377 U.S. 408,

⁶ After *Matson* had been the law for fifteen years, the Judicial Code was revised and reenacted. Although claiming to have made only "changes in phraseology," the revisers added language to include parallel suits or process "against the United States." See 28 U.S.C. § 1500 and the accompanying Reviser's Notes; see also Schwartz, *supra*, at 574, 578 ("the revisers recorded no intent to change substance"). A bare, unexplained change in language, however, cannot create an entirely new congressional policy. The *Matson* decision remains a sound evaluation of Section 1500's genesis and purpose, even if that statute's later "change in phraseology" may have nullified *Matson*'s practical effect.

413 (1964) (quoting *Peck v. Jenness*, 48 U.S. (7 How.) 612, 625 (1848)). In exercising simultaneous jurisdiction, as this Court has recognized, federal courts should "avoid duplicative litigation," but are constrained by "no precise rule." *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976). Suits may proceed concurrently, and "[w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation, does not counsel rigid mechanical solution of such problems." *Kerotest Mfg. Co. v. C-O-Two Co.*, 342 U.S. 180, 183 (1952).

In contrast to the Federal Circuit's reinterpretation, *Casman's* construction of Section 1500 is particularly appropriate given the historical context of the terms of the statute. At the time Congress enacted the predecessor to Section 1500, injunctive or declaratory relief would not have been available in district court if the suit were in reality one against the United States. See generally *Larson v. Domestic & Foreign Commerce Corp.*, 337 U.S. 682 (1949).⁷ Under the 1976 amendment to the Administrative Procedure Act, however, a plaintiff's claim for relief "other than money damages . . . shall not be dismissed nor relief therein be denied on the ground that it is against the United States." 5 U.S.C. § 702. Applying Section 1500 to include a parallel suit for injunctive or declaratory relief would therefore extend the statute's reach to claims which Congress could not have intended to bar.⁸

⁷ A suit might be brought against an agent or officer of the United States, but only where the judgment obtained would not be *res judicata* against the United States. See *United States v. Lee*, 106 U.S. 196, 222 (1882) (allowing suit to try title but noting lack of *res judicata* effect).

⁸ Forcing litigants to delay either their equitable remedies or their money damages would be contrary to Congress' purpose in enacting the 1976 APA amendment. The legislative record of that amendment notes that equitable relief will be available in addition to damage remedies, except where the statute creating damage

The *Casman* rule thus properly accommodates the availability of equitable remedies outside the Claims Court. The Claims Court is free to stay its proceedings while the equitable proceedings are pending in the other court. The burdens imposed on the United States by a stayed lawsuit are manageable. Moreover, the ability to sue the United States in courts other than the Claims Court means that such a separate suit can have a *res judicata* effect on the Claims Court litigation. See, e.g., *Duncan v. United States*, 667 F.2d 36, 38, 229 Ct. Cl. 120 (1981), *cert. denied*, 463 U.S. 1228 (1983); see also 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 4404, at 23 (1981) (noting the "time-honored tradition that a second court is often free to proceed with an action instituted on the same claim as a prior in personam action," and that an earlier judgment will be given *res judicata* effect).

Significantly, only four years ago, the Federal Circuit had reaffirmed *Casman's* importance to an accurate and appropriate construction of Section 1500's jurisdictional scheme. In *Johns-Manville*, *supra*, the Federal Circuit established a new standard for applying Section 1500's directive that the Claims Court shall not exercise jurisdiction over "any claim for or in respect to which the plaintiff . . . has pending in any other court any suit or process against the United States." 28 U.S.C. § 1500. The court of appeals held that the "for or in respect to which" language was "to be defined by the operative facts alleged, not the legal theories raised" in the suit outside the Claims Court. *Johns-Manville*, 855 F.2d at 1563. The *Johns-Manville* court based this broad, "operative facts" test on the *Casman* rule, holding that a

remedies "expressly or impliedly forbids" other forms of relief. H.R. Rep. No. 1656, 94th Cong., 2d Sess. 13 (1976).

The same logic would apply to suits for restitution or reimbursement obtainable only in district court and not in the Claims Court.

parallel suit's "operative facts" were not the same "where a type of relief not available in the Claims Court is sought in the other court." *Johns-Manville*, 855 F.2d at 1568. Reaffirming *Casman*'s conclusion, the Federal Circuit stated that "the legislative history and the cases indicate section 1500 was enacted for the benefit of the government and was intended to force an election *where both forums could grant the same relief*, arising from the same operative facts." *Johns-Manville*, 855 F.2d at 1564 (emphasis added).⁹

The interpretation of Section 1500 established in *Casman* comports with the language, context, and purpose of the statute, is fair to both claimants and the United States, and has stood the test of time. The Federal Circuit's sudden jettisoning of that application of Section 1500 mandates reversal.

III. IF THIS COURT UPHOLDS THE FEDERAL CIRCUIT'S REINTERPRETATION OF SECTION 1500, THE DOCTRINE OF EQUITABLE TOLLING SHOULD APPLY TO CLAIMS OVER WHICH THE CLAIMS COURT IS TEMPORARILY DISABLED FROM EXERCISING JURISDICTION BECAUSE OF THE PENDENCY OF A CASE IN DISTRICT COURT

If permitted to stand, the decision below would arbitrarily impair either the equitable or the money damage claims of parties. As Chief Judge Nies recognized, that untoward result demands that "the option of tolling the statute of limitations should be available to the Claims Court." Pet. App. A25 (Nies, C.J., concurring). This

⁹ In the decision below, the Federal Circuit abruptly uncoupled the "operative facts" test from the *Casman* rule, without acknowledging or explaining this modification of *Johns-Manville*. The court of appeals purported to "reaffirm [its] view in *Johns-Manville*," Pet. App. A21, but that assertion does not square with the court's holding. The Federal Circuit has thus newly created an "operative facts" test far more restrictive than that contemplated by the same court in *Johns-Manville*.

Court's own precedents call for such a mitigation of the Federal Circuit's construction of Section 1500.

This Court has extended the "rebuttable presumption of equitable tolling" to "suits against the United States," and noted that equitable tolling is appropriate "where the claimant has actively pursued his judicial remedies by filing a defective pleading." *Irwin v. Veterans Admin.*, 111 S. Ct. 453, 457-58 (1990). A party who is turned away at the door of the Claims Court has not "slept on his rights but, rather, has been prevented from asserting them." *Burnett v. New York Cent. R.R. Co.*, 380 U.S. 424, 429 (1965). Indeed, if a party brings in the district court a claim that properly belongs in the Claims Court, the claim can be transferred and will be heard even though the statute of limitations has run before the transfer occurs. See 28 U.S.C. § 1631; *Herb v. Pitcairn*, 325 U.S. 77, 78-79 (1945) (action is commenced even where first court cannot proceed to judgment, so long as transfer to proper court is permitted). The rule should be the same where a claim is blocked by Section 1500.

This Court has recognized the applicability of equitable tolling in circumstances analogous to those created by Section 1500, as construed by the Federal Circuit. For example, where exhaustion of administrative remedies is a necessary precursor to bringing suit in court, the statute of limitations is tolled for the period of administrative action. See *Crown Coat Front Co. v. United States*, 386 U.S. 503 (1967). Under former practice, where a case was transferred from a court's equity jurisdiction to its law jurisdiction, a plaintiff upon transfer could add legal claims on which the statute of limitations had run. See *Friederichsen v. Renard*, 247 U.S. 207, 210-11 (1918). Finally, equitable tolling was extended to loyal citizens who were prevented by the Civil War from bringing their claims in the district courts located within the Confederacy. See *Hanger v. Abbott*, 73 U.S. (6 Wall.) 532 (1867). Such cases "all rest on the

ground that the [party] has been disabled to sue, by a superior power, without any default of his own, and, therefore, that none of the reasons which induced the enactment of the statutes apply to his case." *Braun v. Sauerwein*, 77 U.S. (10 Wall.) 218, 222 (1869). That principle squarely applies here.

CONCLUSION

Litigants against the United States should be given at least a chance to obtain redress for their claims. The *Casman* construction of Section 1500 implements the terms of the statute and takes account of Congress's purpose in enacting it, namely, to forbid simultaneous suits for the same relief where one suit would not be *res judicata* for the other. The Federal Circuit's sweeping reinterpretation of Section 1500 therefore is unwarranted.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

CHARLES F. LETTOW *
MICHAEL R. LAZERWITZ
MICHAEL A. MAZZUCHI
CLEARY, GOTTlieb, STEEN &
HAMILTON
1752 N Street, N.W.
Washington, D.C. 20036
(202) 728-2700

* Counsel of Record for
Amicus Curiae Dico, Inc.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

**BRIEF OF AMICI CURIAE
WHITNEY BENEFITS, INC. AND
PETER KIEWIT SONS' CO.
IN SUPPORT OF PETITIONER**

GEORGE W. MILLER *
WALTER A. SMITH, JR.
JONATHAN L. ABRAM
JONATHAN S. FRANKLIN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-6575

* Counsel of Record

Counsel for Amici Curiae

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-166

KEENE CORPORATION,
v. *Petitioner,*

UNITED STATES OF AMERICA,
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**On Writ of Certiorari to the
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**BRIEF OF AMICI CURIAE
WHITNEY BENEFITS, INC. AND
PETER KIEWIT SONS' CO.
IN SUPPORT OF PETITIONER**

INTEREST OF THE AMICI CURIAE

Amici curiae Whitney Benefits, Inc. and Peter Kiewit Sons' Co. ("Amici") are co-plaintiffs and judgment creditors in *Whitney Benefits, Inc. v. United States*, a Claims Court action against the United States for just compensation under the Fifth Amendment. Because Amici may be directly affected by the outcome in this case and because the circumstances of Amici's own action shed light on the issues presented, Amici submit this brief for the Court's consideration.¹

¹ This brief is being filed with the consent of the parties, whose letters of consent have been filed with the Clerk of the Court.

Amici filed their action in 1983, alleging that enactment of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA") effected a taking of their mining property. In 1989, the Claims Court found that Amici were entitled to just compensation and entered a final judgment in the amount of \$60,296,000 plus interest and attorneys' fees. See *Whitney Benefits, Inc. v. United States*, 18 Cl. Ct. 394, 417 (1989). In 1991, the Court of Appeals for the Federal Circuit affirmed that final judgment in all respects and this Court denied the government's petition for a writ of certiorari. See *Whitney Benefits, Inc. v. United States*, 926 F.2d 1169 (Fed. Cir.), cert. denied, 112 S. Ct. 406 (1991). Amici are therefore entitled to receive payment of their adjudicated just compensation once the trial court has clarified the amount of interest to which Amici are entitled.

But instead of accepting this final adjudication, the government has seized on the Federal Circuit's subsequent decision in the present case. In a belated attempt to avoid satisfying Amici's final, fully-appealed judgment, the government has moved under the Claims Court's Rules 60(b)(4) and 12(b)(1) (identical to Fed. R. Civ. P. 60(b)(4) and 12(b)(1)) to vacate that judgment and dismiss Amici's Claims Court action, contending that a District Court action filed by Amici in 1984 divested the Claims Court of jurisdiction under the reinterpretation of 28 U.S.C. § 1500 announced in the decision below. Thus, the government has shown in Amici's case that it intends to use the Federal Circuit's change in the law not just to seek dismissal of Claims Court actions that are still pending, but also to reach back and upset final, fully-appealed judgments.

And the government has shown that it intends to take this position even where, as in Amici's case, the parties seeking compensation were forced to file their District Court suit because of the government's own actions—actions that were taken long before the Federal Circuit

changed the rules through the decision below. Amici filed their District Court suit only after the government had successfully moved to dismiss Amici's Claims Court action on the ground that Amici were obligated to pursue an exchange of federal coal property under § 510(b)(5) of SMCRA, 30 U.S.C. § 1260(b)(5) (1988), before they could seek just compensation in the Claims Court. Their Claims Court action having been dismissed on that ground, Amici had no choice but to return to the Interior Department's administrative coal exchange process that they had already been pursuing for many years without result.

Thus, shortly after the dismissal of their Claims Court action (and while appealing that dismissal), Amici filed suit in District Court against the Secretary of the Interior pursuant to SMCRA's "citizen's suit" provision, 30 U.S.C. § 1270(a) (1988), under which property owners whose coal has been rendered unminable by the Act may compel the Secretary to offer a coal exchange in accordance with SMCRA.² As the District Court eventually found, Amici's citizen's suit was made necessary because the government had "unreasonably delayed" carrying out its statutory duty to offer an exchange. See *Whitney Benefits, Inc. v. Hodel*, No. C84-193K, slip op. at 8 (D. Wyo. May 23, 1985) (Findings of Fact and Conclusions of Law). Nevertheless, the government seeks to apply the Federal Circuit's change in the law against Amici even though the government's own actions gave Amici no choice but to file suit in District Court as a prerequisite for prosecuting their claim in the Claims Court.

The government's intended misuse of the decision below is further shown by the fact that while the government raised a § 1500 argument in Amici's case, it

² The Federal Circuit later reversed the Claims Court's dismissal, holding that the exchange process, including the citizen's suit litigation, was not a prerequisite to or inconsistent with pursuing just compensation in the Claims Court. See *Whitney Benefits, Inc. v. United States*, 752 F.2d 1554, 1556, 1560 (Fed. Cir. 1985).

never even hinted that the statute might divest the Claims Court of jurisdiction because of Amici's citizen's suit. After the Federal Circuit reversed the dismissal of Amici's Claims Court action, the government sought to postpone the trial in the Claims Court so that the exchange process could proceed even longer. The government relied squarely on § 1500, but argued only that it supported postponing trial in the Claims Court, not dismissing the case altogether. Ultimately, the trial was held and the citizen's suit was stayed pending the outcome in the Claims Court.

After the Claims Court entered judgment for Amici, the government appealed and ultimately petitioned this Court for a writ of certiorari. Again, in neither instance did the government ever argue that § 1500 affected the jurisdiction of the Claims Court, presumably because the law was then clear that a later-filed District Court suit did not implicate § 1500. See *Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 170 Ct. Cl. 389 (1965), cert. denied, 382 U.S. 976 (1966). Indeed, prior to the Federal Circuit's *sua sponte* revisiting of *Tecon*, the government had expressly conceded the correctness of that decision. See *Clark v. United States*, 8 Cl. Ct. 649, 652 (1985).³ In addition, the law was clear that § 1500 did not prevent a plaintiff from simultaneously litigating separate claims against the United States in two courts where the two actions sought different forms of relief and neither court had jurisdiction to award both. See *Casman v. United States*, 135 Ct. Cl. 647 (1956). It was not until 1992, after the Federal Circuit overruled *Tecon* and *Casman* in the present case, that the government belatedly argued that the Claims Court lacked jurisdiction to enter its 1989 judgment for Amici, and it did so even though, as noted, the government's own actions had re-

³ Moreover, in oral argument before the Federal Circuit panel in this case, the government argued that *Tecon* was "good law"—a position it said had been approved "up to very high levels of the Department [of Justice]." Official Federal Circuit Audiotape of Oral Argument, Nos. 89-1638, 89-1639 and 89-1648 (Feb. 9, 1990).

quired Amici to file their District Court suit in the first place.

Finally, even after seizing on the decision below and launching its belated jurisdictional attack, the government then attempted to prevent Amici from curing any potential problems raised by the continued pendency of their long-dormant citizen's suit. After the government moved to set aside the Claims Court judgment, Amici sought a voluntary dismissal of their District Court action so that they could subsequently refile certain post-judgment motions⁴ and a protective second complaint. Amici filed a second complaint out of an abundance of caution and in order to preserve their contention that even if the 1989 judgment in their favor were somehow held to be void by reason of the Federal Circuit's decision in this case, § 1500 could not prevent Amici from relitigating their claim for just compensation after the citizen's suit was no longer pending. Nevertheless, the government sought to frustrate Amici's efforts to comply with the government's own new interpretation of § 1500. The government declined to consent to a dismissal of the District Court citizen's suit and it opposed Amici's motion for voluntary dismissal under Fed. R. Civ. P. 41(a)(2). The District Court, however, rejected the government's contentions and granted Amici's motion to dismiss. Following that dismissal, Amici refiled their post-judgment motions in the Claims Court and filed a protective second complaint.

⁴ After all avenues of appeal had been exhausted and this Court had denied certiorari, Amici filed a motion in the Claims Court for reimbursement of their attorneys' fees and litigation expenses, and a motion pursuant to that Court's Rule 60(a) (identical to Fed. R. Civ. P. 60(a)) to clarify the amount of interest to which Amici are entitled. Those motions were pending when the government moved to set aside the 1989 judgment and dismiss Amici's complaint. In an effort to assure that the Claims Court would have jurisdiction to decide Amici's post-judgment motions notwithstanding the Federal Circuit's decision in this case, Amici refiled those motions after the District Court had dismissed their citizen's suit.

Based on the foregoing, Amici obviously have a substantial interest in this case and have filed this brief to make three points. First, Amici urge the Court to reverse the Federal Circuit's erroneous interpretation of § 1500, which forces a plaintiff to elect between two separate statutory claims merely because that plaintiff is required by law to bring those claims in separate courts. Second, Amici urge the Court to make clear that its ruling, regardless of the outcome, will in no event affect Claims Court judgments that are final and as to which all avenues of appeal have been exhausted. And third, Amici ask that the Court make clear that § 1500 can in no event prevent a plaintiff from bringing *successive* actions against the United States in separate courts, as long as the actions are not pending at the same time.

SUMMARY OF ARGUMENT

Section 1500 was intended to prevent duplicative litigation against the government, but was not intended to force plaintiffs to elect between two separate statutory claims that cannot both be brought in the same court. Consequently, the Court should reverse the decision below and hold that § 1500 does not prohibit the simultaneous litigation of such claims in separate courts. In no event, however, should the Court's ruling allow the government to attack final judgments that were fully-appealed prior to the decision below. As the Court has repeatedly stressed, principles of finality and repose prevent a party from disturbing such judgments based on a subsequent change in the law relating to jurisdiction. Finally, the Court should make clear that § 1500 does not prevent a plaintiff from litigating claims against the United States sequentially in different courts.

ARGUMENT

I. SECTION 1500 DOES NOT PREVENT THE SIMULTANEOUS LITIGATION OF SEPARATE STATUTORY CLAIMS THAT CANNOT BE BROUGHT IN THE SAME COURT

Section 1500 prohibits the Claims Court from assuming jurisdiction over "any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States" 28 U.S.C. § 1500 (1988). Thus, this provision applies only when the plaintiff simultaneously litigates the same claim against the government in two courts, but not when the plaintiff litigates different claims in different courts. The latter point applies with particular force to plaintiffs such as Amici, who were required by law to bring their claims in separate courts. Section 1500 was intended to be a shield protecting the government from duplicative litigation; nothing in its text or legislative history indicates that it was intended to be a sword cutting off separate statutory claims merely because they cannot be brought in the same court.

The question of what constitutes separate claims under § 1500 was decided long ago in *Casman v. United States*, 135 Ct. Cl. 647 (1956), a holding that stood for over 35 years. There, a plaintiff who was wrongfully terminated from his government post sued the United States in District Court for an injunction restoring him to his position, and subsequently brought an action in the Court of Claims seeking to recover his salary. The Court of Claims ruled that these actions had to proceed in separate courts and did not run afoul of § 1500:

Plaintiff's suit in the district court asks for nothing but injunctive relief and his suit in this court asks for a money judgment for back pay. Since plaintiff has no right to elect between two courts, section 1500, *supra*, is inapplicable in this case. To hold otherwise would be to say to plaintiff, "If you

want your job back you must forget your back pay"; conversely, "If you want your back pay, you cannot have your job back." Certainly that is not the language of the statute nor the intent of Congress.

Plaintiff does not have pending in any other court a suit "for or in respect to" his claim for back pay within the meaning of section 1500, *supra*.

Id. at 650.⁵ *Casman*, however, was expressly overruled by the Federal Circuit in the present case. See *UNR Industries, Inc. v. United States*, 962 F.2d 1013, 1022 n.3 (Fed. Cir. 1992).

Amici submit that *Casman* sets forth the proper interpretation of § 1500 and that the Federal Circuit erred in overruling that case.⁶ At most, § 1500 requires a plaintiff to elect one forum to pursue a single claim against the

⁵ Former § 1491 of Title 28 was amended in 1972 to allow the Court of Claims to grant equitable relief of the type that the plaintiff in *Casman* could only have obtained in the District Court. See Pub. L. No. 92-415, § 1, 86 Stat. 652 (1972) (codified as amended at 28 U.S.C. § 1491(a)(2) (1988)); S. Rep. No. 1066, 92d Cong., 2d Sess. 2 (1972), reprinted in 1972 U.S.C.C.A.N. 3116, 3117-18 (amendment obviates need for wrongfully discharged government employee to file two lawsuits in order to obtain complete relief).

⁶ *Casman* in no way conflicts with this Court's decision in *Corona Coal Co. v. United States*, 263 U.S. 537 (1924). In that case, plaintiff had filed a District Court action, "the causes of action therein set forth being the same" as those in a Court of Claims action. *Id.* at 539.

Neither did *Corona Coal* address the question decided in *Tecon*: whether a later-filed District Court action will divest the Claims Court of jurisdiction under § 1500. In *Corona Coal*, that issue was neither raised by the parties, nor discussed or decided by the Court. Accordingly, *Corona Coal* is not *stare decisis* on that question. See, e.g., *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (an issue "not . . . raised in briefs or argument nor discussed in the opinion of the Court" is not *stare decisis*); *Webster v. Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents").

government; but § 1500 does not require a plaintiff to forfeit one of two distinct claims that must be brought in separate courts. As with the plaintiff in *Casman*, Amici sought two different forms of relief that could not be obtained in the same court—just compensation under the Fifth Amendment and an injunction requiring the Secretary of the Interior to offer a coal exchange in compliance with SMCRA.⁷

Moreover, the government forced Amici to file their District Court action, as the government had convinced the Claims Court that Amici were required to exhaust the SMCRA exchange process before they could pursue an action for just compensation, and the government's unreasonable delay of that process required Amici to file their citizen's suit to compel progress. In these circumstances, § 1500 should not be construed to penalize Amici for doing that which the law as expounded in 1984 required. As the Court of Claims held in *Brown v. United States*, 358 F.2d 1002, 1004, 175 Ct. Cl. 343, 348 (1966)—also overruled by the decision below (see 962 F.2d at 1022)—§ 1500 cannot be used to "deprive plaintiffs of the only forum they have in which to test their demand for just compensation."

Thus, as in *Casman*, § 1500 cannot affect the 1989 Claims Court judgment in favor of Amici even if that judgment were still open to attack.⁸ To hold otherwise would force a plaintiff to forbear from litigating a potentially valid claim, thereby risking a statute of limita-

⁷ The Claims Court's authority to grant injunctive relief did not encompass the relief sought by Amici in the District Court. See 28 U.S.C. § 1491(a)(2), (3) (1988). In addition, SMCRA citizen's suits "may be brought only in the judicial district in which the surface coal mining operation complained of is located." 30 U.S.C. § 1270(c)(1) (1988). See also *Save Our Cumberland Mountains, Inc. v. Lujan*, 963 F.2d 1541 (D.C. Cir. 1992). Finally, the District Court did not have jurisdiction over Amici's claim for just compensation in excess of \$10,000. See 28 U.S.C. § 1346(a)(2) (1988).

⁸ As explained below, Amici's judgment cannot be attacked based on a subsequent change in the law. See *infra* at 10-13.

tions bar, until another separate claim has been adjudicated in a different court.⁹ Section 1500 was intended to prevent duplicative litigation, but it was not intended to extinguish claims against the government. The Court should so hold in this case.

II. IN NO EVENT SHOULD THE COURT'S RULING CALL INTO QUESTION THE VALIDITY OF FINAL JUDGMENTS AS TO WHICH ALL AVENUES OF APPEAL HAD BEEN EXHAUSTED BEFORE THE DECISION BELOW

Amici's judgment for \$60,296,000 plus interest was final and fully-appealed as of the date this Court denied the government's petition for a writ of certiorari in November 1991. Nevertheless, the government has now attempted to attack that judgment based on the Federal Circuit's subsequent reinterpretation of § 1500 in the decision below. Thus, Amici's situation demonstrates the far-reaching scope ascribed by the government to the decision below. Not only does the government seek to undo *pending* cases that had previously been predicated on settled interpretations of § 1500, but it seeks to do the same to judgments that were already final and fully-appealed before the Federal Circuit overruled its prior § 1500 jurisprudence. Regardless of the merits of this

⁹ As noted below, this dilemma could perhaps be ameliorated by the doctrine of equitable tolling. See *infra* at 13-14 n.12. However, the government—the intended beneficiary of § 1500—would be no better off, and in fact might be worse off, if plaintiffs must litigate separate claims sequentially. To the extent one action may have some preclusive effects on the other, one of the actions could be stayed (as occurred with Amici's citizen's suit and was the general practice under *Casman*), thereby preventing the government from wasting resources by defending both suits at once. And in other instances, the government will benefit from addressing both actions simultaneously. Since the government will have to defend the separate actions in any event, it would be well-served to pool its resources and address them at the same time, rather than engage in potentially duplicative litigation involving stale claims. Indeed, it is for precisely this reason that *res judicata* principles generally require a plaintiff to bring all claims in a single action.

overruling, the government should not be permitted to rely on it to overturn previously-final judgments. Accordingly, even if the Court affirms the decision below or otherwise adopts an interpretation of § 1500 at odds with prior law, it should make clear that its ruling cannot be the basis for attacks on final judgments as to which all avenues of appeal had been exhausted prior to the change in the law brought about by this case.

This Court has repeatedly made clear that final judgments may not be attacked based on a change in the law that occurred after all avenues of appeal had been exhausted. As the Court held in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), "[t]he past cannot always be erased by a new judicial declaration." *Id.* at 374. Although the lower federal courts have only limited jurisdiction,

none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. *Their determinations of such questions, while open to direct review, may not be assailed collaterally.*

Id. at 376 (emphasis added). *Accord, Insurance Corp. v. Compagnie Des Bauxites*, 456 U.S. 694, 702 n.9 (1982) ("A party that has had an opportunity to litigate the question of subject matter jurisdiction may not . . . reopen that question in a collateral attack upon an adverse judgment").¹⁰

Accordingly, in *Chicot County* the Court held that the failure of a party to challenge subject matter jurisdiction on direct review precluded that party from subse-

¹⁰ See also *Dowell v. Applegate*, 152 U.S. 327, 340 (1894); *Des Moines Navigation and Railroad Co. v. Iowa Homestead Co.*, 123 U.S. 552, 557 (1887); *McCormick v. Sullivant*, 23 U.S. (10 Wheat.) 192, 199 (1825).

quently attacking the final and fully-appealed judgment based on a later change in the law. Applying this same principle, the lower federal courts have uniformly held that a final judgment is not rendered "void" within the meaning of Fed. R. Civ. P. 60(b)(4)—and thereby subject to attack after direct review—merely because of a subsequent change in the law relating to jurisdiction. Those cases have held that a judgment may be subject to such attack only where the court's exercise of jurisdiction constituted a clear usurpation of power in light of the governing law at the time of the court's decision.¹¹ This was plainly not the case with respect to Amici's claim, as the Claims Court properly assumed jurisdiction under settled law that was not overruled until after its 1989 judgment had become final. And the same is true of countless other long-since-final judgments of the Claims Court.

For these reasons, Amici urge the Court to make clear that any re-interpretation of § 1500 will not affect judgments that are final and as to which all avenues of appeal had been exhausted prior to the decision below. Long-standing principles of finality and repose compel this result. Otherwise, litigation would never end. It cannot be the law that every new interpretation of a jurisdictional provision applies not only to cases then pending in the trial court or on direct review, but also calls into question untold numbers of long-since-final and fully-appealed judgments. The Court should expressly reject that result in this case. As was recently recognized in *James B. Beam Distilling Co. v. Georgia*, 111 S. Ct. 2439 (1991), "once suit is barred by res judicata or by statutes of limitation

¹¹ See, e.g., *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990); *United States v. Zima*, 766 F.2d 1153, 1159-61 (7th Cir. 1985); *Honneus v. Donovan*, 691 F.2d 1, 2 (1st Cir. 1982); *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 226 (10th Cir. 1979); *Ben Sager Chemicals Int'l, Inc. v. E. Targosz & Co.*, 560 F.2d 805, 812 (7th Cir. 1977); *Lubben v. Selective Serv. System Local Bd. No. 27*, 453 F.2d 645, 649-50 (1st Cir. 1972); *Independence Mortgage Trust v. White*, 446 F. Supp. 120, 123-24 (D. Ore. 1978).

or repose, a new rule cannot reopen the door already closed." *Id.* at 2446 (Opinion of Souter, J.) (citing *Chicot County*).

III. SECTION 1500 DOES NOT DIVEST THE CLAIMS COURT OF JURISDICTION WHEN TWO ACTIONS ARE NOT PENDING SIMULTANEOUSLY

By its terms, § 1500 affects the jurisdiction of the Claims Court only when the same claim is "*pending* in any other court." 28 U.S.C. § 1500 (emphasis added). Accordingly, under any interpretation of § 1500, that statute does not apply unless two actions are pending in more than one court *at the same time*; it does not prohibit *sequential* litigation against the United States in separate courts.

Neither the Federal Circuit nor the government has taken a contrary view. In the decision below, the Federal Circuit held that "if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of res judicata apply." 962 F.2d at 1021. Similarly, the government has stated in this case that:

The jurisdictional bar of Section 1500 remains in force until suit or process in the other court is terminated. Once the other suit is terminated, the plaintiff may then sue in the Claims Court, as long as the action is not barred by the statute of limitations.

Brief of the United States in Opposition at 11 (No. 92-166).¹²

¹² Amici disagree with the government to the extent it argues that the statute of limitations would not be tolled if a plaintiff were prevented from bringing a Claims Court action until the termination of another suit in another court. The Federal Circuit did not reach this question, but Chief Judge Nies explicitly stated in her concurring opinion that the doctrine of "equitable tolling" should be applied in such instances. As Chief Judge Nies wrote, "[w]here a party has possibly two claims for relief and is barred from asserting

Thus, even if the Court were to affirm the decision below, it should also confirm that § 1500 applies only when two claims are pending simultaneously, and that it in no event prevents a plaintiff from sequentially litigating separate claims against the United States in the Claims Court and elsewhere. The only bar to such litigation is the law of *res judicata*.

CONCLUSION

The Court should reverse the decision below and restore § 1500 to the role intended by its drafters. In no event, however, should the Court permit § 1500 to be used to attack final judgments as to which all avenues of appeal had been exhausted prior to the decision below or to bar a plaintiff from sequentially litigating claims against the government.

Respectfully submitted,

GEORGE W. MILLER *
WALTER A. SMITH, JR.
JONATHAN L. ABRAM
JONATHAN S. FRANKLIN
HOGAN & HARTSON
555 Thirteenth Street, N.W.
Washington, D.C. 20004-1109
(202) 637-6575

* Counsel of Record

Counsel for Amici Curiae

Dated: December 10, 1992

them concurrently by section 1500, I do not believe the period allowed for bringing the additional or alternative claim should arbitrarily be cut off or even shortened. Section 1500 does not require such forfeiture." 962 F.2d at 1026. As explained above, Amici believe this same reasoning leads to the conclusion that § 1500 does not bar concurrent litigation of separate claims that cannot be brought in the same court. However, even if the Court were to decline to adopt that interpretation, it should nonetheless prevent confusion by making clear that the doctrine of equitable tolling would prevent the forfeiture of the second claim.

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No. 92-166

Supreme Court, U.S.
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

**BRIEF AMICUS CURIAE OF THE
CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA IN SUPPORT OF PETITIONER**

Of Counsel:

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

HERBERT L. FENSTER *
RAY M. ARAGON
JAMES R. FARNSWORTH
MCKENNA & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

*Counsel for Amicus Curiae
Chamber of Commerce of the
United States of America*

* Counsel of Record

26 PP

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

 No. 92-166

KEENE CORPORATION,
v. *Petitioner,*

THE UNITED STATES OF AMERICA,
Respondent.

**On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit**

**BRIEF AMICUS CURIAE OF THE
CHAMBER OF COMMERCE OF THE UNITED STATES
OF AMERICA IN SUPPORT OF PETITIONER**

STATEMENT OF INTEREST OF AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the largest federation of businesses, companies, and associations in the world. With substantial membership in each of the fifty states, the Chamber represents more than 200,000 businesses and organizations and serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in critical issues before the Supreme Court of the United States, the lower courts, the United States Congress, the Executive Branch, and independent regulatory agencies of the federal government. The Chamber also seeks to advance those interests by filing briefs in cases of importance to the business community.

Many of the Chamber's members are large and small businesses which have extensive relationships with federal government agencies. For a variety of reasons, these members may have monetary or equitable claims against the government. Thus, the primary issue presented by this case, i.e., whether claimants against the United States government will be prevented from seeking full relief in appropriate courts due to the Court of Appeals for the Federal Circuit's restrictive view of 28 U.S.C. § 1500 (1988) (to be codified as amended at 28 U.S.C. § 1500 (1992)) ("Section 1500"), is of great concern to Chamber members. The membership of the Chamber takes issue with the government's position that Section 1500 should force claimants to make a pre-filing election between monetary claims that may be heard only in the Court of Federal Claims ("Claims Court"), and claims for equitable relief that in most instances must be heard in federal district court. In the Chamber's view, such a reading of Section 1500 is unsupported by its language, its legislative history, and its interpretation by the courts over a period of decades.

The preservation and protection of claims against the government is a critical cornerstone of due process law. Moreover, Congress has waived sovereign immunity under statutes such as the Tucker Act, the Federal Tort Claims Act ("FTCA") and the Administrative Procedure Act ("APA"), to induce Chamber members and many other entities to enter into voluntary relationships with the government including contracts. Potential claimants have relied on having access to the courts in a variety of actions to vindicate their interests, and any interpretation of Section 1500 that denies claimants access to the appropriate federal courts may amount to a denial of due process.

SUMMARY OF ARGUMENT

Until the instant case, the essential meaning of Section 1500 was unchanged for more than a century: claimants against the United States are precluded from pursuing similar relief in two courts at once. Now, in

UNR Industries, Inc. v. United States, 962 F.2d 1013 (Fed. Cir.), cert. granted sub nom. *Keene Corp. v. United States*, 113 S. Ct. 373 (1992) ("UNR"), a Federal Circuit *en banc* panel has radically redefined Section 1500 in a manner that limits access to the courts for all government claimants.

In addition to redefining wholly the concept of "pending," the UNR panel rewrote the meaning of the word "claim." Under the well-developed pre-UNR law, a "claim" is any effort to seek a nonduplicative remedy in a court of appropriate jurisdiction. By judicial fiat, the UNR panel has decided a "claim" now means any cause of action, theory of recovery, or remedy based on similar "operative facts," even if the claimant seeks relief available only from different courts. Thus, a litigant prosecuting a monetary claim in Claims Court must forego access to all other courts on any related issue while his case is pending, *even if relief is not available in Claims Court*. A claimant seeking equitable relief from the district court for any reason, even to preserve the status quo pending the outcome of his Claims Court action, will have his action dismissed.

Congress did not intend such a result. The legislative history of Section 1500 and Congress' recent passage of transfer statutes illustrate that Congress' intent in 1868 and today is to have valid causes of action heard on the merits, rather than dismissed through procedural roadblocks. Moreover, since Congress has waived sovereign immunity through statutes such as the Tucker Act, the APA and the FTCA, due process requires a reasonably appropriate forum to vindicate meritorious claims. The Federal Circuit's reading of Section 1500, which forces claimants to choose between prosecuting money claims and seeking all other non-monetary relief, does not meet the requirements of due process.*

* Petitioner Keene Corporation and Respondent United States of America have consented to the filing of this amicus brief. Their respective letters of consent are filed herewith.

ARGUMENT

I. THE UNR PANEL'S RESTRICTIVE DEFINITION OF A "CLAIM" WOULD DEPRIVE CLAIMANTS OF THE ABILITY TO SEEK BOTH EQUITABLE AND LEGAL RELIEF, RESULTING IN DEPRIVATION OF DUE PROCESS.

A. The UNR Panel Erred In Interpreting "Claim" To Include Actions For Both Legal And Equitable Relief.

The UNR panel redefined "claim" as "whatever theories that arise from the same operative facts." *UNR*, 962 F.2d at 1023 (quotations omitted). In so doing, the UNR panel purported to adopt the "operative facts" test set forth in *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1567 (Fed. Cir. 1988) (per curiam), cert. denied, 489 U.S. 1066 (1989). While the UNR panel used the same words employed by the *Johns-Manville* court, it resolutely ignored all nuance in the *Johns-Manville* opinion, and expressly overruled *Casman v. United States*, 135 Ct. Cl. 647 (1956), a case upon which the logic of *Johns-Manville* rests. In so doing, the UNR panel destroyed the careful and logical judicial development of Section 1500 and replaced it with a drastic rule of procrustean uniformity.

1. The UNR Panel Creates A "Catch 22" Which Prevents Claimants From Seeking The Relief Congress Intended Them To Have.

Casman stands for the proposition that a claim is defined by any fact situation in which nonduplicative relief is sought. In *Casman*, the Court of Claims, the Article 1 predecessor to the Federal Circuit, determined that a district court claimant seeking reinstatement to a federal job should not have his Court of Claims action for backpay dismissed. Citing the legislative history, the Court of Claims determined that Section 1500 was intended to force an election among courts that could de-

termine the same claim. 135 Ct. Cl. at 649. If, however, the theories of relief sought in the two courts "are totally different" Section 1500 does not apply:

Since plaintiff has no right to elect between two courts, [Section 1500] is inapplicable in this case. To hold otherwise would be to say to plaintiff, "If you want your job back you must forget your back pay;" conversely, "If you want your back pay you cannot have your job back." Certainly that is not the language of the statute nor the intent of Congress.

Id. at 650.

The *Casman* rule was reaffirmed in *City of Santa Clara v. United States*, 215 Ct. Cl. 890 (1977), in which the Court of Claims again determined that a suit in district court for injunctive relief could not preclude a suit in the Court of Claims for money damages:

Although plaintiff's claim here is based on the same governmental action as is its suit in the district court, plaintiff has, in a strict legal sense, requested a remedy here that is totally unavailable in district court. . . . *We do not believe that plaintiff should be denied the right ever to claim money damages merely because it also seeks to enjoin [future government action]. We conclude, therefore, that jurisdiction in this court is not precluded by [Section 1500].*

Id. at 892-93 (emphasis added) (citation omitted).¹

In *Johns-Manville*, the Federal Circuit expressly accepted *Casman* and *Santa Clara* in addressing what facts and legal theories constituted a "claim" under Section

¹ *Accord Cantieri Rovina v. United States*, 10 Cl. Ct. 634, 640-41 (1986) (Section 1500 not triggered if "dissimilar" relief is sought in separate case); *Truckee-Carson Irrigation Dist. v. United States*, 223 Ct. Cl. 684, 685 (1980) (same); *Pitt River Home & Agric. Coop. Ass'n v. United States*, 215 Ct. Cl. 959, 961 (1977) (same); *Scott Aviation v. United States*, 23 Cl. Ct. 573, 575 (1991) (claims are identical if they arise from the same operative facts and seek the same kind of relief) (citing *Johns-Manville*, 855 F.2d at 1562).

1500. Finding no express definition of "claim" in the language or legislative history of Section 1500, the *Johns-Manville* court found the situation Congress wanted to remedy (i.e., Southern planters bringing "cotton claims" in multiple courts) involved duplicative claims for money judgment brought on different legal theories, and concluded that legal theories are not necessarily "claims." 855 F.2d at 1561.

In reaching this conclusion, the *Johns-Manville* court cited, *inter alia*, *British American Tobacco Co. v. United States*, 89 Ct. Cl. 438, 440 (1939), *cert. denied*, 310 U.S. 627 (1940), for the proposition that:

the operative facts relied upon by a claimant [do] not state two separate and distinct causes of action merely because such facts may set up a liability both in tort and contract. . . . We think it is clear that the word "claim," as used in section 154 [now Section 1500] . . . has no reference to the legal theory upon which a claimant seeks to enforce his demand. . . .

855 F.2d at 1562 (emphasis added) (quoting *British American Tobacco Co.*, 89 Ct. Cl. at 440). The *Johns-Manville* court also cited *Los Angeles Shipbuilding & Drydock Corp. v. United States*, 152 F. Supp. 236, 238, 138 Ct. Cl. 648 (1957), in which the Court of Claims found that actions for recovery of taxes on theories of overpayment (district court) and account stated (Court of Claims) constituted only one claim—for refund of the taxes—that should be dismissed under Section 1500. 855 F.2d at 1562.

The *Johns-Manville* court agreed that a district court tort action would preclude a later Claims Court contract action if they were "duplicative actions on the same operative facts." *Id.* at 1563. However, the *Johns-Manville* court also cited *Casman*, *Truckee-Carson* and *Santa Clara* as establishing that Section 1500 does not apply when nonduplicative relief is sought in several courts. *Id.* at

1563 n.9. Thus, under *Johns-Manville*, a lawsuit addressed to a court of appropriate (and unique) jurisdiction is a separate claim if the relief sought is not duplicative.

The *Johns-Manville* court determined that the contract and tort causes of action alleged by the appellant in that case were duplicative because (1) the "operative facts" alleged were the same, and (2) the relief sought (i.e., recovery for costs and other damages connected to suits against *Johns-Manville* for asbestos injuries) was also identical. *Id.* at 1563. The theories of liability (i.e., tort and contract) were irrelevant, since a claim is defined by the facts alleged and the relief sought, "not the legal theories raised." *Id.* Thus, under *Johns-Manville*, Section 1500 is not implicated in cases brought under theories of both tort and contract, provided the facts were different or the relief sought was not duplicative.

Ignoring this careful reasoning, the UNR panel, claiming to "reaffirm" *Johns-Manville*, employed a brutally simplistic, historically inaccurate definition of "claim" requiring claimants to make outcome-determinative elections of remedies even before filing suit. UNR, 962 F.2d at 1023. In "reaffirming" statements the *Johns-Manville* court never made, the UNR panel engaged in an unwarranted revision of well-developed law.²

² It is curious that the UNR panel, while claiming to reaffirm *Johns-Manville*, expressly overruled a Federal Circuit case following it. In *Boston Five Cents Sav. Bank v. United States*, 864 F.2d 137, 139 (Fed. Cir. 1988), overruled by *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992), the Federal Circuit cites *Johns-Manville* for the proposition that Section 1500 is not applicable when "a type of relief not available in the Claims Court is sought in the other court." *Id.* (quoting *Johns-Manville*, 855 F.2d at 1568). On the logic of *Johns-Manville*, the *Boston Five Cents* court concluded that "because different types of relief are sought, jurisdiction over the monetary claim lies in the Claims Court." *Id.*

The *UNR* panel's revision of Section 1500 exalts form over substance. In its desire to present a tidy resolution of a complex issue, it presents government claimants with a Hobson's choice fraught with unknowable and potentially devastating consequences. A claimant seeking monetary relief in the Claims Court must fore swear injunctive or declaratory relief, and trust his opponent, the government, not to change the status quo. Of course, should the claimant seek any equitable relief from the district court, the Claims Court will lose jurisdiction to hear his monetary claim. *UNR*, 962 F.2d at 1021.

Alternatively, a complainant may bring equitable claims in the district court under the FTCA or the APA, hoping for a final judgment in time to seek recovery under the six-year Tucker Act limitations period. Once again, the claimant must hope that the court calendar is clear, the judge is swift, the government is diligent, and the appeals court is prompt. Events beyond the claimant's control will determine whether his claims are ever heard on the merits.

The application of the *UNR* panel's reasoning to the facts of *Casman* shows its practical effect. Under the *UNR* rule, the *Casman* plaintiff could not seek both reinstatement to his former position and backpay. If he wanted backpay, he must sue in Claims Court and fore swear all other courts. Alternatively, should he decide to seek reinstatement, he would have to sue in district court, effectively foregoing monetary relief. He could, theoretically, sue first for reinstatement, then for backpay. But given the backlog in the courts and the government's new ability to block the courthouse doors by the mere filing of an appeal or a petition for a writ of certiorari, see *UNR*, 962 F.2d at 1021, his ability to prosecute both legal and equitable claims would be based more on chance than on the legal merits of his arguments.

In a perverse twist, under the *UNR* panel's view of Section 1500, a claimant's access to the courts would be

largely based on the activities of the government. If a plaintiff tried to seek equitable relief in district court followed by a Claims Court monetary claim, the government has every incentive to stall the district court action to block access to a monetary claim. Delay, rather than good faith litigation, would become the government's best ally, since delaying a monetary claim long enough bars a hearing on the merits.

Even more ominously, the *UNR* panel's reading of Section 1500 creates a strategic incentive for the government to whipsaw claimants between several courts or to force a claimant to appear in an action that would destroy the jurisdiction of the claimant's chosen forum. For example, in *Nevada Power Co. v. United States*, 229 Ct. Cl. 783 (1982), a claimant sued in district court to have government regulations declared invalid, and in the Court of Claims for return of monies wrongly collected under the regulations. The district court found the regulations invalid. The Court of Claims accepted jurisdiction and stayed the proceedings pending the outcome of appeals of the district court judgment. *Id.* at 785.

Under the *UNR* rule, such a district court victory would be pyrrhic. The claimant's money claim (and, potentially, the money claims of all others who might seek recovery on the same legal theory) would be dismissed under Section 1500 because the district court action, in which claimant established his right to recovery, was still on appeal. Thus, under *UNR*, even if a claimant can establish that the government regulations under which he made payments were invalid, he may not seek monetary relief until that judgment is final. All the government must do is wait the claimant out through appeals and petitions for writs of certiorari until the limitations period for money claims has passed.³

³ Ironically, the more important the issue, the more likely this is to happen, since the government is more likely to appeal "impact" cases or cases involving large amounts of money.

2. The UNR Panel Failed To Consider The Extremely Limited Power Of The Claims Court To Grant Relief.

In overruling *Casman*, the UNR panel failed to consider *Casman*'s basic point: that a court of limited jurisdiction such as the Court of Claims (or Claims Court) is constrained in its ability to provide relief to plaintiffs, and thus should not be a barrier to relief in other courts.⁴ *Casman*, 135 Ct. Cl. at 650.

This Court has clearly spoken to this precise issue. In *Bowen v. Massachusetts*, 487 U.S. 879 (1988), the Court considered whether the APA (5 U.S.C. § 702 (1988)), in conjunction with 28 U.S.C. § 1331 (1988), permitted the district court to consider a state's complaint that the Secretary of Health and Human Services ("HHS") wrongly withheld Medicaid payments. HHS claimed that because the state allegedly sought "money damages," jurisdiction rested solely with the Claims Court pursuant to the Tucker Act. 487 U.S. at 887, 890 n.14.

This Court disagreed. While the Court found it "clear" that Congress did not intend the grant of review under the APA to duplicate existing procedures for judicial review of agency action, it also found that the ability of the Claims Court to provide "money damages" was an inadequate remedy since it did not have "the general equitable powers of a district court to grant prospective relief." *Id.* at 905. The Court said "[w]e are not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief." *Id.* Given the "doubtful and limited" relief available in the Claims Court, having access to the Claims Court was an inadequate

⁴ The logic and continued vitality of this argument was highlighted by the Claims Court's opinion in *Security Sav. & Loan Ass'n v. United States*, 26 Cl. Ct. 1000 (1992), in which Chief Judge Smith underscored the court's limited jurisdiction and inability to grant injunctions under the All Writs Act.

substitute for district court review. *Id.* at 901. Indeed, the Court was untroubled by the possibility that some of the relief sought in district court could have been sought in the Claims Court: "the fact that the purely monetary aspects of the case could have been decided in the Claims Court is not a sufficient reason to bar that aspect of the relief available in a district court." *Id.* at 910-11 n.48.⁵

Notwithstanding the intricacies of its facts, *Bowen* has a clear message: the Claims Court can provide only limited relief, and many injuries that arise as a result of wrongful governmental action, and for which the government has waived its sovereign immunity, cannot be addressed there. To address these injuries fully, claimants must be provided with access to appropriate courts.

A clear discussion of this issue took place in *Sharp v. Weinberger*, 798 F.2d 1521 (D.C. Cir. 1986). In an opinion by then-Circuit Judge Scalia, the court considered whether an Air Force Ready Reserve officer who made constitutional and equitable claims pursuant to his employment contract could bring his claims in district court. *Id.* at 1521-23. While stating that jurisdiction for money damages related to government contracts could be heard only in the Claims Court if they involved claims in excess of \$10,000, the court determined that, under the APA, the district court properly took jurisdiction over Sharp's constitutional and equitable claims.⁶ *Id.* at 1523-24. See also *Transohio Sav. Bank v. OTS*, 967 F.2d 598,

⁵ We see a struggle emerging between the courts of limited jurisdiction and those of general jurisdiction to satisfy the needs of claimants against the United States. This is particularly true where the "claims" may encompass both monetary and non-monetary relief or where the availability of monetary relief may be uncertain. See discussion *infra* and see, e.g., *Hubbard v. EPA*, No. 90-5233 (D.C. Cir. Nov. 27, 1992) (en banc).

⁶ The *Sharp* panel also concluded that money damages were the only contractual remedy available to Sharp, since Congress has not authorized other remedies. 798 F.2d at 1523-24.

610 (D.C. Cir. 1992) (claims for damages must be brought in Claims Court, but statutory and constitutional claims related to the existence of the contract may be brought in district court); *Southeast Kansas Community Action Prog., Inc. v. Lyng*, 967 F.2d 1452, 1456 (10th Cir. 1992) (same); *Hamilton Stores, Inc. v. Hodel*, 925 F.2d 1272, 1279 n.14 (10th Cir. 1991) (same); *Spectrum Leasing Corp. v. United States*, 764 F.2d 891, 895 n.6 (D.C. Cir. 1985) (specific performance and damages are not equivalent remedies, even if the specific remedy involves payment of money); *Marshall Leasing, Inc. v. United States*, 893 F.2d 1096, 1100-01 (9th Cir. 1990) (due process claims for taking of property that Claims Court will not hear may be heard in district court, even if the Claims Court has statutory authority to hear them).

In the light of these strong judicial statements that claimants should be given access to courts which can grant them relief, the UNR panel's reading of Section 1500 stands in sharp contrast. Given Congress' provision of relief for meritorious monetary, tort and equitable claims against the government and the clear guidance of this Court that claimants are not to be denied access to the courts that may grant them relief, the restrictive statement of the UNR panel must be reversed.

B. The UNR Panel's Restrictive Reading Of Section 1500 Denies Claimants An Opportunity To Seek Redress, Resulting In A Denial Of Due Process.

As shown, the *en banc* panel's reading of Section 1500 would deny claimants access to the forums provided by Congress under, *inter alia*, the Tucker Act, the FTCA and the APA. Although Congress has made clear that the government may be sued for both monetary or non-monetary relief under these and other acts, UNR ensures that many such claims will never be heard by the courts, or at best, that fate dictated by timing rather than merit will determine their outcome.

The Due Process Clause forbids such a result. As this Court discussed at length in *Logan v. Zimmerman*, 455 U.S. 422, 428 (1982), it is settled that "a cause of action is a species of property" protected by due process. If the government grants a claimant a cause of action, it must also provide a forum in which that cause of action may be vindicated.

In *Zimmerman*, a complainant under a state fair employment practice act made a discrimination claim to a state commission in the manner required by statute, only to have the complaint dismissed when the commission did not hold a timely hearing. *Id.* at 427. The Illinois Supreme Court determined that the state's failure to hold a timely hearing rendered it powerless to address the discrimination claim. *Id.*

This Court reversed, based on its "traditional" view "that the Due Process Clause protect[s] civil litigants who seek recourse in the courts, either as defendants hoping to protect their property or as plaintiffs attempting to redress grievances." *Id.* at 429. Since the *Zimmerman* complainant was denied a hearing on the merits for reasons beyond his control, he was entitled to a hearing in a forum that could provide him complete relief.⁷

This Court found that a property right to adjudicatory procedures was not novel. Quoting *Societe Internationale v. Rogers*, 357 U.S. 197 (1958), the Court stated that the "'property' component of the Fifth Amendment's Due Process Clause" imposes "constitutional limitations upon the power of courts, even in aid of their own valid proc-

⁷ In *Zimmerman*, the complainant had the option of seeking recovery from the state under an independent tort action. However, this Court found that a tort suit would not make the complainant whole, since the act governing claims against the state did not provide for reinstatement. *Id.* at 436-37. Likewise, the UNR panel's reading of Section 1500 condemns claimants to the unsatisfactory alternatives of seeking either monetary relief or equitable relief, but not both, since their monetary claims will be dismissed if equitable relief is sought in district court. UNR, 962 F.2d at 1021.

esses, to dismiss an action without affording a party the opportunity for the hearing on the merits of his cause." *Zimmerman*, 455 U.S. at 429 (quoting *Societe Internationale*, 357 U.S. at 209). Denying potential litigants use of established adjudicatory procedures offends due process, as it "den[ies] them an opportunity to be heard upon their claimed rights." *Zimmerman*, 455 U.S. at 430 (citing *Boddie v. Connecticut*, 401 U.S. 371, 390 (1971)).⁸ See also *Barrett v. United States*, 689 F.2d 324, 332 (2d Cir. 1982), cert. denied, 462 U.S. 1131 (1983) (FTCA cause of action is a property interest protected by the Due Process Clause).

That is the situation here. In an unwarranted display of judicial legislation, the *UNR* panel has erected a procedural limitation on the ability of claimants to seek appropriate relief. A government claimant's access will now be based on the complexity of his claim, the speed of the courts, and the good will of his adversary, the government. This is inadequate. "A system or procedure that deprives persons of their claims in a random manner . . . necessarily presents a unjustifiably high risk that meritorious claims will be terminated." *Zimmerman*, 455 U.S. at 434-35. The situation legislated by the *UNR* panel is worse than random, since it gives government agencies opposing claims not only the incentive to take action to keep claimants' demands for monetary relief out of Claims Court, but also the affirmative power to do so.

There is no doubt that Congress may determine whether and in what manner it waives the sovereign immunity of the United States. *Maricopa County v. Valley Bank*, 318 U.S. 357, 362 (1942) (Congress may change the terms under which government may be sued); *Lynch v. United States*, 292 U.S. 571, 581 (1934) (consent to sue

⁸ In *Martinez v. California*, 444 U.S. 277, 281-82 (1980), this Court stated that "[a]rguably, the cause of action [for wrongful death] that the State has created is a species of property protected by the Due Process Clause."

United States is revokable). However, Section 1500 is neither a waiver of sovereign immunity nor a limitation on the waivers clearly expressed in statutes such as the FTCA, the APA and the Tucker Act. Rather, as passed and accepted by Congress for more than a century, Section 1500 is a procedural, jurisdiction-limiting tool to help the courts order their business and prevent multiple hearings on the merits of the same claims. As such, the courts may not use Section 1500 as a sword to cut off meritorious causes of action. The *UNR* panel's unsupported interpretation of Section 1500 denies claimants the court access Congress guaranteed in, *inter alia*, the Tucker Act and the FTCA.

II. CONGRESS' INTENT IN PASSING SECTION 1500 WAS TO AVOID RETRYING IDENTICAL CASES, NOT TO AVOID LEGITIMATE CLAIMS.

A. Congress Passed Section 1500 To Avoid Duplicative Claims In Multiple Courts.

The *UNR* panel termed the statutory history of Section 1500 "fairly straightforward." *UNR*, 962 F.2d at 1017. Nevertheless, it rewrote Section 1500 without considering what the word "claim" meant when the original statute was written, nor what, with Congress' blessing, it has meant in the 120 years since. In contrast, the analysis of Section 1500 in *Casman* and its progeny is consistent with Congress' intent to require a litigant to elect a single forum in which to seek a given remedy.

Senator George Edmonds, author of the 1868 version of Section 1500, explained its purpose:

The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute

their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I'm sure everybody will agree with that.

Cong. Globe, 40th Cong., 2d Sess. 2769 (1868), *quoted in Johns-Manville*, 855 F.2d 1556, 1560.

This statement must be read in historical context. In 1868, *res judicata* did not bar retrial of the same cotton claim brought against a federal officer (in district court) and the United States (in the Court of Claims). *Matson Navigation v. United States*, 284 U.S. 352, 356 (1932).⁹ A cotton claimant who lost in district court on a theory of conversion could have a second trial for reimbursement for the same cotton in the Court of Claims under the Captured and Abandoned Property Act of 1863. According to its author, Section 1500 was intended to prevent such duplicative trials. There is no indication whatsoever that Congress intended to limit claims seeking completely different relief. In taking action that Congress could have taken, but did not, the *UNR* panel decided that Section 1500 should mean something completely different than Congress intended.

B. The 1982 and 1988 Federal Transfer Statutes Illustrate That Congress' Intent Was To Have Meritorious Claims Determined On The Merits.

The Chamber's interpretation of the congressional intent in passing Section 1500 and in accepting judicial

⁹ This Court said: "the declared purpose of the section was only to require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be *res adjudicata* in the suit pending in the Court of Claims." 284 U.S. at 355-56 (citations omitted).

interpretations of Section 1500 since *Casman* is bolstered by Congress' expressed concerns in passing the transfer provisions of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 301, 96 Stat. 55 (1982) (codified at 28 U.S.C. § 1631 (1988)), and a related transfer provision in the Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, § 501, 102 Stat. 4642 (1988) (codified as amended at 28 U.S.C. § 1292 (d)(4)(B) (1992)).

Under 28 U.S.C. § 1631, when a civil action or appeal is filed in a district court, court of appeals, Claims Court or the Court of International Trade, and the court of filing is without jurisdiction, "the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed," to proceed as if it had been originally filed in the appropriate court. 28 U.S.C. § 1631.

This statute illustrates a clear congressional intent that the mere forum of filing (i.e., a suit for monetary damages in the district court) should not be an outcome-determinative event even if, in retrospect, the wrong court is chosen. This logic, extended to the *UNR* action, indicates that Congress was concerned about claims being lost because of the "unnecessary risk" to litigants created by the overlapping jurisdiction of specialized courts.

The legislative history of the transfer statute supports a broad reading of Congress' intent:

Much confusion has been engendered by provisions of existing law that leave unclear which of two or more federal courts including courts at both the trial and appellate level—have subject matter jurisdiction over certain categories of civil actions. The problem has been particularly acute in the area of administrative law where misfilings and dual filings have become commonplace. The uncertainty in some statutes regarding which court has review authority creates an unnecessary risk that a litigant may find

himself without a remedy because of a lawyer's error or a technicality of procedure.

. . . .

. . . This provision is broadly drafted to allow transfer between any two Federal Courts.

S. Rep. No. 275, 97th Cong., 2d Sess. 11, 30 (1981), reprinted in 1982 U.S.C.C.A.N. 11, 21, 40 (emphasis added). Thus, it was Congress' clear intent that mistakes or legal uncertainties regarding the proper court in which to file an action were to be ignored. "[T]echnicalit[ies] of procedure" are not to eclipse the importance of the merits of a claim. *Id.* at 21.

The judicial interpretation of Section 1631 is also relevant. In some instances, the Claims Court has determined that the statute supports the bifurcation of claims between the Claims Court and district court. See *Hicks v. United States*, 23 Cl. Ct. 647, 653 (1991) (Claims Court retains jurisdiction over claim for recovery of interest paid while transferring claims for liquidated damages, statutory violations and injunctive relief to district court); *Froudi v. United States*, 22 Cl. Ct. 290, 298-99 (1991) (Claims Court retains jurisdiction over just compensation claim while transferring claims in equity to district court).¹⁰ Cases such as these reflect Congress' broad intention to provide access to appropriate courts.

The passage of 28 U.S.C. § 1292(d)(4)(B) is further unmistakable evidence that Congress intended claimants to have access to courts with the power to grant appropriate relief. This section provides that when a motion is filed to transfer an action from the district court to the Claims Court, the action will be stayed for sixty days after the district court rules on the motion, in order to permit an appeal of an adverse decision. Moreover, and critically, the section also provides that the

¹⁰ But see *Deems Lewis McKinley v. United States*, 14 Cl. Ct. 418, 420 (1988) (Claims Court refuses to bifurcate plaintiff's claims).

stay "shall not bar the granting of preliminary or injunctive relief, where appropriate and where expedition is reasonably necessary." *Id.* In other words, claimants against the government can seek and be granted necessary equitable remedies from the district court *even if their case is ultimately found to be solely within the jurisdiction of the Claims Court.*

Congress' reasoning in passing this section is clearly expressed in the legislative history, in which Congress expressed concern that claimants not lose rights while issues of jurisdiction are considered:

[The stay] would not bar the granting of preliminary or interim relief under circumstances where it would otherwise be appropriate and where expedition is reasonably necessary. In some cases, a delay of even sixty days could serve to deprive a litigant of important rights or even the primary objective of the litigat[i]on.

H.R. Rep. No. 889, 100th Cong., 2d Sess. 53 (1988), reprinted in 1988 U.S.C.C.A.N. 5982, 6013.

The application of this clear intent to the present situation is obvious. Congress does not intend, and has taken clear steps to prevent, precisely the outcome the government urges in *UNR*. Under the transfer statutes, the filing of an action in a court that is ultimately determined to be without jurisdiction will not destroy the cause of action in the appropriate court. Thus, Congress clearly endorsed the *Boston Five Cents* rule that monetary claims filed in district court do not deprive the appropriate court (i.e., the Claims Court) of jurisdiction to hear the case. The amendments to 28 U.S.C. § 1292 specifically empowering the district courts to provide equitable relief in cases being transferred to the Claims Court indicate that Congress wanted claimants to have access to the equitable powers of the district court, even if the claims ultimately were within the sole jurisdiction of the

Claims Court. The *en banc* opinion is inconsistent with Congress' express wishes and should be reversed.

CONCLUSION

The *UNR* decision is an unwarranted example of judicial legislation. The interpretation of Section 1500 developed by the *UNR* panel is unsupported by Section 1500's history and is inconsistent with Congress' intent that claimants against the government have access to appropriate courts, and is particularly egregious in light of the Claims Court's extremely limited power to provide appropriate remedies. The Chamber of Commerce of the United States of America respectfully urges this Court to reverse the decision of the *UNR* panel.

Respectfully submitted,

Of Counsel:

ROBIN S. CONRAD
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

HERBERT L. FENSTER *
RAY M. ARAGON
JAMES R. FARNSWORTH
MCKENNA & CUNEO
1575 Eye Street, N.W.
Washington, D.C. 20005
(202) 789-7500

*Counsel for Amicus Curiae
Chamber of Commerce of the
United States of America*

December 10, 1992

* Counsel of Record

APPENDIX

28 U.S.C. § 1500

Pendency of claims in other courts

The United States Court of Federal Claims shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

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Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION,
v. *Petitioner,*
THE UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

BRIEF OF NATIONAL ASSOCIATION OF
HOME BUILDERS AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER

Of Counsel:

MARY V. DiCRESCENZO
NATIONAL ASSOCIATION OF
HOME BUILDERS
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0200

ALBERT J. BEVERIDGE, III *
VIRGINIA S. ALBRECHT
DAVID G. ISAACS
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 789-6000

Counsel for Amicus

* Counsel of Record

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| 28 U.S.C. § 1491 (a) (1) | 17 |
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| 28 U.S.C. § 1500 | passim |
| 33 U.S.C. § 1344 | 2 |
| 41 U.S.C. § 114 (b) | 4 |
| Act of June 25, 1868, § 8, 15 Stat. 75, 77 | 8 |
| Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1135 (1940) | 8 |
| Act of June 25, 1948, ch. 646, 62 Stat. 942 (1948) | 8 |
| Captured and Abandoned Property Act of 1863, ch. 120, 12 Stat. 820 | 7 |
| RULES: | |
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| R.U.S.C.C. No. 14 | 4 |
| LEGISLATIVE HISTORY: | |
| 81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868) | 9 |
| 2 Cong. Rec. 129 (daily ed. Dec. 10, 1873) | 8 |
| MISCELLANEOUS: | |
| Schwartz, <i>Section 1500 of The Judicial Code and Duplicate Suits Against The Government and Its Agents</i> , 55 Geo. L. J. 573 (1967) | 7, 18 |

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-166

KEENE CORPORATION,
v. *Petitioner,*
THE UNITED STATES,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Federal Circuit

**BRIEF OF NATIONAL ASSOCIATION OF
HOME BUILDERS AS *AMICUS CURIAE*
IN SUPPORT OF PETITIONER**

The National Association of Home Builders ("NAHB") respectfully files this brief as *amicus curiae* in support of the Petitioner. The NAHB has received the written consent of counsel to file this brief, and has filed the letters of consent with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

The NAHB represents over 158,000 builder and associate members organized into approximately 850 affiliated state and local associations in all 50 states, the District of Columbia and Puerto Rico. Its members include not only individuals and firms that construct and supply single-family homes, but also apartment, condominium, commercial and industrial builders, as well as land devel-

opers and remodelers. It is the principal spokesman for the American shelter industry.

The NAHB is before this Court because of its interest in the Just Compensation Clause of the Fifth Amendment and the implications of the decision below on the jurisdiction of the Claims Court to hear such claims. The NAHB views the Just Compensation Clause as an important shield against oppressive federal land use regulation. The availability of compensation for Government action that results in a "taking" is critical to the livelihood of private landowners who either (1) have lost all reasonable economic use of their property because of Government decisions intended to serve the broader public interest; or (2) are otherwise faced with governmental requirements that fail to substantially advance legitimate governmental interests. Since the Claims Court has exclusive jurisdiction over most such takings cases involving the federal Government, the NAHB is vitally interested in any procedural device which would divest that court of jurisdiction to hear such claims.

FACTUAL CONSIDERATIONS

The facts in the instant case represent a typical fact pattern for a motion to dismiss under 28 U.S.C. § 1500 ("Section 1500"). Plaintiff in the Claims Court, either prior or subsequent to filing a claim in that court, files or has filed a related suit against the United States in federal district court. The Government then files a motion to dismiss the action in Claims Court, even if the district court action is no longer pending. Although the scenario of the case under review is typical, there are a number of other situations in which Section 1500 operates which are of particular interest to *amicus*.

Many of these situations grow out of the federal government's regulation of wetlands under Section 404 of the Clean Water Act, 33 U.S.C. § 1344. Under Section 404, any person proposing to fill a wetland must obtain a per-

mit from the U.S. Army Corps of Engineers (the "Corps"). If a permit is denied, the landowner may seek review of the Corps' decision in district court, the only court which has jurisdiction over the matter, alleging that the denial was arbitrary and capricious. The landowner may also believe that the permit denial constitutes a "taking" under the Fifth Amendment, and therefore may file a claim in Claims Court, which has exclusive jurisdiction over takings claims in excess of \$10,000. It is common for landowners to file a takings claim in Claims Court while the challenge to the permit denial is pending in district court in order to preserve the claim before the running of the statute of limitations. Based on the Federal Circuit's decision in the case under review, the Government has recently taken the position that Section 1500 bars resort to the Claims Court, even though the Claims Court cannot grant the relief sought in the district court and the district court cannot grant the relief sought in the Claims Court.

The severe impact of the *UNR* decision¹ on these types of cases is illustrated by a recent takings case involving a homebuilder. In that case the Corps denied a permit to fill wetlands, and the homebuilder filed a challenge in district court. One year later, while the permit challenge was still pending, the homebuilder filed a takings claim in Claims Court, which the homebuilder and the Government agreed to stay pending the resolution of the district court action. The district court subsequently upheld the Corps' permit denial.² The Claims Court then found that the permit denial constituted a taking under the Fifth Amendment and awarded the homebuilder

¹ *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992), cert. granted, sub. nom., *Keene Corp. v. United States*, 113 S. Ct. 373 (1992).

² See *Loveladies Harbor, Inc. v. Baldwin*, 20 Env't. Rep. Cas. (BNA) 1897 (D.N.J. 1984), aff'd mem., 751 F.2d 376 (3d Cir. 1984).

\$2,658,000 plus interest.³ The Government's appeal of this ruling is now pending before the Federal Circuit. After issuance of the decision in *UNR* the Government has moved in the Federal Circuit to dismiss the claim and vacate the award, arguing that because the challenge to the permit denial and the takings claim were pending at the same time and arose from the same operative facts (*i.e.*, the Corps' permit denial), Section 1500 divests the Claims Court of jurisdiction.⁴ |

SUMMARY OF ARGUMENT

The Federal Circuit's conclusion that Section 1500 operates as an absolute bar to jurisdiction in the Claims Court whenever a plaintiff simultaneously has or had pending a district court and a Claims Court action is inconsistent with the history of Section 1500. This provision was originally enacted to force a small class of claimants seeking only money damages against the Government to choose between seeking such relief in either district court or in Claims Court. Nothing in the legislative history of Section 1500 suggests that it was intended to bar jurisdic-

³ See *Loveladies Harbor, Inc. v. United States*, 21 Cl. Ct. 153 (1990), appeal docketed, No. 91-5050 (Fed. Cir. Feb. 15, 1991).

⁴ The Government has also taken the position that Section 1500 may operate against litigants who are brought unwillingly into the Claims Court through the operation of 41 U.S.C. § 114(b). In *Thomas Mercer, et al. and Eastern Resources, Inc. v. United States*, No. 91-23-L (W.D. Ky. filed Feb. 26, 1990), for example, the lessee of a surface coal mine brought a declaratory judgment action in the district court to test a cease and desist order issued by the Corps relating to the alleged unlawful filling of wetlands in Western Kentucky. While that litigation was in progress, the lessor brought a takings case in the Claims Court and the court, on the government's motion pursuant to 41 U.S.C. § 114(b) and R.U.S.C.C. No. 14, ordered the lessee to assert any claims it might have relating to the lessor's case or be forever barred. The lessee filed its claim in Claims Court pursuant to this order, and after the *UNR* decision, the Government responded by seeking a dismissal pursuant to Section 1500. That motion is still pending.

tion in the Claims Court simply because the plaintiff has a related claim pending in another court at some point during the Claims Court action.

The Federal Circuit's decision in *UNR* also disrupts established jurisdictional principles of this Court and decades of sound practice by the Claims Court. Under past practice, a plaintiff who ran afoul of Section 1500 by having two claims pending concurrently could "cure" the defect by dismissing the district court action and remaining in the Claims Court. This practice was consistent with the text of Section 1500, which is triggered only when two claims are "pending" at the same time. If one claim is no longer "pending," Section 1500 is not brought into operation.

The *UNR* court compounds its mischief by reaching beyond the case at hand and deciding that Section 1500 bars litigants with no choice of forum from seeking different relief at the same time in district court and Claims Court. Because the Claims Court has exclusive jurisdiction over certain matters relating to the Federal Government and because its authority is generally limited to granting monetary relief, plaintiffs seeking equitable or other forms of relief from the Government often have no choice but to file a separate action in district court. Such parties have no choice of forum and therefore cannot elect to remain in either Claims Court or district court. Nonetheless, in order to avoid the running of the statute of limitations on either claim, these parties are often forced to have both matters pending at the same time. The *UNR* decision, however, reversed decades of case law holding that Section 1500 is inapplicable where the plaintiff has no choice of forum. Therefore, the effect of this decision is to deprive citizens of the opportunity to obtain the relief available under the law against the Government.

ARGUMENT

I. SECTION 1500 WAS NOT INTENDED TO OPERATE AS A JURISDICTIONAL BAR

The opinion of the Federal Circuit in *UNR* is based on the proposition that Section 1500 establishes a jurisdictional bar that either precludes the Claims Court from asserting jurisdiction at the outset, or divests the Claims Court of jurisdiction it once had, at any stage of the litigation if a claim in another court involving substantially the same facts overlaps with the Claims Court case by even one day. The effect of the decision is to transform what had for decades been regarded as a curable litigation defect—the existence of a Claims Court case and a district court case pending at the same time—into a fatal jurisdictional bar that the plaintiff is powerless to cure, even by voluntarily dismissing the action pending in district court. This interpretation of Section 1500 is inconsistent with its legislative history and the jurisdictional precedents of this Court.

A. Congress Did Not Intend Section 1500 To Act as an Absolute Bar Whenever Two Cases Have Been Pending at the Same Time

When first passed, the original version of Section 1500 had a relatively modest objective: “to require an election between a suit in the Court of Claims and one brought in another court . . . in which the judgment would not be *res adjudicata* in the suit pending in the Court of Claims . . .” *Matson Navigation Co. v. United States*, 284 U.S. 352, 356 (1932). The problem was the limited application at that time of principles of *res judicata* to separate suits against the Government and against its agents. Congress’ concern was that claimants could bring an action in one court against a Government agent for money damages, and another claim against the United States in another court seeking essentially the same money damages. The Government would be at risk

twice because there would be no *res judicata* effect from either judgment. Consequently, Congress enacted the predecessors to Section 1500 to spare the Government from defending itself against the same claim for money damages in two courts at the same time. One commentator has thoroughly reviewed the background to Section 1500 and confirms this view:

The underlying reason for the section was the limited application of the rule of *res judicata* in suits against Government and against government officers. Without the section . . . the claimants could retry the issues in a second suit against the United States. This was possible because the judgment in the first suit against the government officer-agent would not be *res judicata* in the second suit against the United States. Accordingly, the election required by the statute has been understood as designed only to provide a substitute for the absent rule of *res judicata* in successive suits against a government officer and against the Government.

Schwartz, *Section 1500 of The Judicial Code and Duplicate Suits Against The Government and Its Agents*, 55 Geo. L. J. 573, 578 (1967).

The concern over the Government being compelled to defend itself against duplicative suits for money damages arose in connection with legislation enacted to compensate certain victims of the Civil War. See generally *UNR*, 962 F.2d at 1017-19. Toward the close of that war, Congress passed the Captured and Abandoned Property Act to permit claimants who had been loyal to the Union to recover property, particularly cotton, that had been seized by the Government in furtherance of its war effort.⁵ The Act provided: “. . . any person claiming to have been the owner of any such abandoned or captured

⁵ See Captured and Abandoned Property Act of 1863, 37th Cong., 3d Sess., ch. 120, 12 Stat. 820 (hereinafter the “Act” or the “Abandoned Property Act”).

property may, at any time within two years after the suppression of the rebellion, prefer his claim . . . to the court of claims." Prior to the passage of the Act, claims involving abandoned or captured property could only be brought in a district court against an officer of the United States under a tort theory. The Act gave the so-called "cotton claimants" the choice to sue the United States Government in the Court of Claims or, as previously, an officer of the United States in a district court.⁶

As a result of this dual jurisdiction, the United States was frequently forced under the Abandoned Property Act to defend against the same action in the Court of Claims it had won in a different forum. Reacting to what was considered an abuse of the legal process, Congress passed a new statute in 1868 that required such "cotton claimants" to make an election between proceeding in a district court and the Court of Claims. Section 8 of this statute, a predecessor to Section 1500, provided: "no person shall file or prosecute any claim or suit in the Court of Claims, or an appeal therefrom, for or in respect to which he . . . shall have commenced and has pending any suit or process in any other court . . ." Act of June 25, 1868, § 8, 15 Stat. 75, 77. *See generally UNR*, 962 F.2d at 1017-19.⁷ As Senator Edmunds of Vermont, the author of the bill, explained:

⁶ *See generally Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1561 (Fed. Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989).

⁷ Section 8 was incorporated into the Revised Statutes of 1874 without any substantive revision. *See* 2 Cong. Rec. 129 (daily ed. Dec. 10, 1873) (statement of Rep. Butler). The provision was then adopted without change in the Judicial Code of 1911. *See* Act of Mar. 3, 1911, ch. 231, § 154, 36 Stat. 1135, 1138 (*codified at* 28 U.S.C. § 260 (1940)). Section 8 was next adopted as part of the Judicial Code in 1948, and was modified to its current form as Section 1500. *See* Act of June 25, 1948, ch. 646, 62 Stat. 942 (*codified at* 28 U.S.C. § 1500 (1948)). In the absence of substantive changes to Section 8, the current version of Section 1500 should be interpreted consistently with Section 8. *See Tecon Engineers, Inc. v. United States*, 343 F.2d 943, 949 (Ct. Cl. 1965) ("there is no

The object of this amendment [Section 8] is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868) (*quoted in UNR*, 962 F.2d at 1018).

Three things are readily apparent from this oft-quoted legislative history. First, at the time the Act of 1868 was passed, Section 8 was intended to apply only to claimants under the Abandoned Property Act. Although Section 1500 has been given a broader application over the years, its original purpose was limited. Second, the section was designed to conserve Government resources by preventing litigants from having "two bites at the apple" in different courts against the Government. Finally, the section is inapplicable when the claimant has no choice of forum, because its purpose was to require litigants with claims for money damages against the Government to "elect[] between a suit in the Court of Claims and one brought in another court." *Matson Navigation*, 284 U.S. at 356.⁸

Contrary to the *UNR* holding, the purpose of Section 1500 was not to create a bar preventing litigants from

evidence of any intent of Congress at any time to change the legal effect of the original Section 8 of the Act of June 25, 1868"), *cert. denied*, 382 U.S. 976 (1966).

⁸ We discuss this point in greater detail in Part II, *infra* at 15-19.

having access to the Claims Court. Senator Edmunds' statement in the legislative history makes it clear that the purpose of the statute is to require litigants to make an "election" of forum and to either "leave" the Claims Court or to "leave" the other court. There is no indication in this statement that, once a litigant "leaves" the district court in accordance with this provision, the litigant will be barred on jurisdictional grounds from pursuing the claim in Claims Court. Section 1500 was intended to protect the Government from duplicative litigation, not to deprive litigants with claims against the Government from asserting those claims in an appropriate forum. By transforming Section 1500 from a limited measure intended to conserve litigation resources into a blunt instrument that deprives litigants of an opportunity to bring those claims, the *UNR* court went beyond the language and history of Section 1500.

B. Dismissal of the District Court Action Can "Cure" the Defect and Allow the Claims Court To Retain Jurisdiction

In addition to lacking support in the language and legislative history of Section 1500, the analysis of the *UNR* court is contrary to jurisdictional principles established by this Court and the long-established practice of the Claims Court. In ruling that Section 1500 operates as a jurisdictional defect that divests the Claims Court of jurisdiction whenever a second claim has been filed in another court, the Federal Circuit overturned decades of judicial interpretation and sound jurisdictional principles.

The flaw in the *UNR* court's reasoning is its view that the concurrent existence of cases in the Claims Court and another court creates a jurisdictional defect that cannot be remedied. The court construed the pendency of two claims as a fatal defect, similar to the lack of subject matter jurisdiction, that cannot be cured. No party can waive the absence of subject matter jurisdiction; see *In-*

urance Corp. of Ireland, Ltd. v. Compagnie des Baux-ites de Guinee, 456 U.S. 694, 702 (1982); this defect can be addressed by a court at any time, see, e.g., Fed. R. Civ. P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action"); and a court may raise it on its own motion. See *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). In contrast to fatal jurisdictional defects such as lack of subject matter jurisdiction, courts have recognized certain litigation defects that can be cured by the plaintiff. See, e.g., *Ranger Transportation, Inc. v. Wal-Mart Stores*, 903 F.2d 1185, 1187 (8th Cir. 1990) (proper procedure where indispensable party is absent from litigation is to give the parties an opportunity to bring in that party, not to dismiss the action).

Under past practice interpreting Section 1500, the existence of a claim in district court has been consistently interpreted as a curable litigation defect, not a jurisdictional bar. Thus, a claimant who has run afoul of Section 1500 is given the opportunity to cure the defect. In *Brown v. United States*, 358 F.2d 1002 (Ct. Cl. 1966) (per curiam), for example, the Court of Claims dismissed a claim because petitioner had a similar claim pending in a district court at the same time. When the district court dismissed the action for lack of jurisdiction, the Court of Claims vacated its previous decision and reinstated the original claim. The court stated: "Our earlier order of dismissal was predicated on the fact that the other 'claim remains pending in the said District Court.' That is no longer true, and the claim is no longer 'pending in any other court.'" *Id.* at 1004 (citation omitted).⁹ Even where the Court of Claims has dismissed a claim because of the pendency of a similar claim in another court, the court has stated that the plaintiff is precluded from bring-

⁹ The *UNR* court expressly overruled *Brown*. See *UNR*, 962 F.2d at 1022.

ing a second claim only "so long as said claim remained pending in the District Court." *Frantz Equipment Co. v. United States*, 98 F. Supp. 579, 580 (Ct. Cl. 1951).

The Claims Court loses jurisdiction only when a plaintiff has failed to "cure" the defect and has the same claim pending in another court at the time the Claims Court rules on a motion to dismiss under Section 1500. Section 1500 is directed only at instances where a plaintiff with a claim in Claims Court "has pending" a second claim against the United States in another court. The proper interpretation of the phrase "has pending" is to read it as "is pending when the court acts on a motion to dismiss." A plaintiff who has filed claims against the United States in two courts may continue to proceed in Claims Court, consistent with Section 1500, so long as the other claim is no longer pending when the Claims Court rules on a motion under Section 1500. To read the usage of the present tense in Section 1500—addressing instances where the second claim "is pending"—to reach instances where the second claim was "once pending at some earlier time" strains the plain language of the statute.

The *UNR* holding can be tested by two hypotheticals. First, if a plaintiff files an action in district court after he has filed a similar claim in Claims Court, why does the Claims Court lose jurisdiction? Filing in another forum may be a litigation flaw, but it should not bar the initial tribunal from hearing the case if that court had subject matter jurisdiction at the outset. Second, if a plaintiff files a claim in district court followed by a claim in the Claims Court and then dismisses his district court suit before the Government answers or moves to dismiss, why should his Claims Court claim be dismissed? He has put the Government to no expense, nor has he wasted judicial or legal resources.

This Court has "consistently held that if jurisdiction exists at the time an action is commenced, such jurisdic-

tion may not be divested by subsequent events." *Freeport-McMoRan, Inc. v. K N Energy, Inc.*, 111 S. Ct. 858, 860 (1991) (per curiam). Thus, once a proper claim has been duly filed in the Claims Court, the court has jurisdiction over the claim regardless whether the litigant subsequently files a claim in district court, although it may be subject to dismissal upon proper motion. This is the holding of *Tecon Engineers, Inc. v. United States*, 343 F.2d 943 (Ct. Cl. 1965), *cert. denied*, 382 U.S. 976 (1966), which held that the Claims Court was not divested of jurisdiction if the plaintiff commenced an action on the same claim in another court after the filing of the action in Claims Court.¹⁰

The rule established in *UNR* is also inconsistent with this Court's jurisdictional precedents when applied to instances where the claim in another court is filed prior to the filing of the complaint in Claims Court. As this Court has acknowledged, even the rule that the presence or absence of jurisdiction is established at the time of filing is subject to exceptions. See *Newman-Green, Inc. v. Alfonso-Larrain*, 109 S. Ct. 2218, 2222 (1989). In *Newman-Green*, plaintiffs brought a claim in federal court on the basis of diversity jurisdiction although complete diversity was absent. This Court held that the Court of Appeals had the authority to grant the plaintiff's motion to dismiss a dispensable non-diverse party in order to establish complete diversity and maintain federal subject matter jurisdiction. *Id.* at 2223-26. Thus, even though jurisdiction may be lacking at the time of the filing of the complaint, subsequent action of a plaintiff to correct the jurisdictional deficiency allows a federal court to retain jurisdiction. Absence of diversity is a defect more serious than the issue addressed by Section 1500, yet the *Newman-Green* decision demonstrates that such a defect is curable. Accordingly, under similar

¹⁰ The *UNR* court expressly overruled *Tecon Engineers*. See *UNR*, 962 F.2d at 1023.

reasoning, Section 1500 should be read to allow the Claims Court to retain jurisdiction over cases filed with the Claims Court where an earlier-filed district court claim has been disposed of.

The original statute did not withdraw subject matter jurisdiction from the Claims Court, but provided that "no person shall file or prosecute any claim" where the party has the same claim "pending" in another court.¹¹ This language is by its terms a litigation defect which is curable. The Federal Circuit in the *UNR* opinion suggested this Court has construed the phrase "no person shall file or prosecute" as a form of permanent jurisdictional bar, citing *In Re Skinner & Eddy Corp.*, 265 U.S. 86 (1924), but such a reading goes too far. The actual holding in that case is that a plaintiff in the Claims Court had an absolute right to dismiss a claim before judgment, just as he had at common law or in equity. As additional support for its decision, the *Skinner* Court referred to the predecessor of Section 1500, stating that the institution of a suit against the Government in state court one day after dismissal from the Court of Claims of the same cause of action "necessarily prevented the petitioner from suing on those claims in the Court of Claims" *Id.* The Court nowhere intimates that the institution of a suit in another court is a permanent flaw which could not be cured.

¹¹ Section 1500 currently states that the Claims Court "shall not have jurisdiction" over claims where the same claim "is pending" in another court. 28 U.S.C. § 1500. The change between the language of the earlier version and the current version was intended to be "in phraseology" only. See Reviser's Notes, 28 U.S.C. § 1500, p. 1862 (1948) (quoted in *UNR*, 962 F.2d at 1018). Thus, the current version of Section 1500 should be read consistently with the earlier version. See *supra* n.7.

II. SECTION 1500 OPERATES ONLY WHEN A LITIGANT HAS A CHOICE OF FORUM

One remarkable feature of the *UNR* opinion is that the Federal Circuit went far beyond the issues before it to consider matters only peripheral to a decision in the case. In particular, the Federal Circuit decided that Section 1500 is triggered whenever there are two cases pending at the same time that arise from the same operative facts, regardless whether plaintiffs have a choice of forum. In so ruling, the court overruled decisions which had stood for many years, thereby reaching results inconsistent with the legislative history of Section 1500 and accepted judicial interpretation.

Specifically, the Court overturned *Casman v. United States*, 135 Ct. Cl. 647 (1956) and cases which follow that decision. The *Casman* line of cases essentially hold that Section 1500 does not operate if the other suit in the other court seeks relief the Claims Court cannot grant. In *Casman*, the plaintiff had been discharged from the Office of Military Governor in Narnberg, Germany. He sued in the district court seeking restoration to his former position. After he had won in district court, but while the case was on appeal by the Government, Casman sought back pay in the Court of Claims. In response to the Government's motion to dismiss the Court of Claims suit pursuant to Section 1500, the Court of Claims looked to the legislative history quoted above and to *Matson Navigation Co. v. United States* 284 U.S. 352 (1932),¹² both of which, it noted, speak in terms of requiring a plaintiff to make an election. It denied the Government's motion, stating:

Here the plaintiff obviously had no right to elect between courts. The claim in this case and the

¹² In *Matson*, this Court stated that the purpose of Section 1500 "was only to require an election between a suit in the Court of Claims and one brought in another court" *Id.* at 355-56.

relief sought in the district court are entirely different. The claim of plaintiff for back pay is one that falls exclusively within the jurisdiction of this court, and there is no other court which plaintiff might elect [citation omitted]. On the other hand, the Court of Claims is without jurisdiction to restore plaintiff to his position.

Casman, 135 Ct. Cl. at 650. The *Casman* Court's logic is impeccable, and its reading of the legislative history and the prior teachings of this Court are accurate. No wonder that the *Casman* principle has been consistently followed and recently reaffirmed. See *Hosseini v. United States*, 218 Ct. Cl. 727 (1978); *Boston Five Cents Savings Bank, FSB v. United States*, 864 F.2d 137 (Fed. Cir. 1988). The *UNR* Court overturned these cases as well. See *UNR*, 962 F.2d at 1022 n.3.

The fundamental premise of these decisions, now overruled by *UNR*, is that Section 1500 only applies when a litigant has a choice of forum. The Federal Circuit rejected without discussion this principle to reach a conclusion we submit is wrong. Since the issue is of great importance to *amicus* and its members we urge the Court to address this part of the Federal Circuit's opinion even though it may not be necessary to decide the precise issue before it.

As quoted above, Senator Edmunds, who provided the only legislative history, twice mentions "put[ting] to their election" the class of plaintiffs who have the choice of suing in the district court or the Claims Court. Applying Section 1500 makes sense where a plaintiff has the choice of electing between filing a claim in Claims Court or a district court,¹³ but makes little sense where the plaintiff seeks relief that may only be granted by the Claims Court

¹³ For example, district courts have concurrent jurisdiction with the Claims Court over certain tax claims and other civil actions not exceeding \$10,000. See 28 U.S.C. § 1346(a).

and separate relief that may only be granted by a district court. In such instances, the plaintiff lacks the ability to make an "election" and "leave" one court or the other.

One example of such a scenario which is of particular importance to *amicus* is in the context of a denial of a wetlands permit. In such cases, the landowner may seek declaratory judgment or equitable relief in district court, and just compensation pursuant to a takings claim in Claims Court. If the value of the takings claim exceeds \$10,000, the Claims Court has exclusive jurisdiction. See 28 U.S.C. §§ 1346(a); 1491(a)(1); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016-17 (1984). The Claims Court, however, lacks the authority to grant equitable relief. See, e.g., *Richardson v. Morris*, 409 U.S. 464, 465 (1973) (per curiam) (the Tucker Act "has long been construed as authorizing only actions for money judgments and not suits for equitable relief against the United States [t]he reason for the distinction flows from the fact that the Court of Claims has no power to grant equitable relief") (citation omitted). Thus, plaintiffs are barred by jurisdictional rules from bringing takings claims and equitable claims in the same court. Nonetheless, the result of the *UNR* decision is to foreclose a litigant from obtaining these distinct forms of relief against the United States, unless the litigant is fortunate enough to have his equitable claims completely resolved, including all appeals, before the statute of limitations bars his legal claim in Claims Court.

There is a larger principle involved here than a proper reading of legislative history or due regard to precedent. The Federal Government has established a judicial system to which litigants can appeal if they have been dealt with unfairly by the Government or have otherwise suffered as a result of governmental action. That system has its own complications, since in many cases, the jurisdictions of the various tribunals are exclusive and litigants cannot easily determine in which court they should proceed.

But there are some jurisdictional matters which are clear. Only a federal district court can grant equitable relief, and its jurisdiction to grant monetary damages against the Government under the Tucker Act is limited to \$10,000. The Claims Court, on the other hand, cannot in most instances grant equitable relief,¹⁴ but is not limited in the amount of monetary damages it may award against the Government.

Given these jurisdictional principles, the *UNR* decision serves to prevent citizens from having the opportunity to fairly litigate their claims against the Government. Is it likely that Congress intended a citizen who is entitled to pursue both restoration of his status in equity and damages at law to forgo one measure of relief to gain the other? There is not a shred of evidence that Congress ever contemplated such an outcome and until *UNR* no court had suggested such a result. Certainly, an obscure statute designed "only to provide a substitute for the doctrine of res judicata,"¹⁵ should not be the vehicle for such a distortion of the law. Section 1500 was adopted to protect the Government from duplicative litigation that wastes legal resources, not to restrict

¹⁴ The Claims Court has certain equitable power in "specific kinds of litigation." *Bowen v. Massachusetts*, 487 U.S. 879, 905 n.40 (1988). In order "[t]o provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records" 28 U.S.C. § 1491(a)(2). See also *id.* § 1491(a)(3). This authority is limited by its terms to cases concerning federal employment and contracts. *Id.* In addition, this action can only be taken where such relief is " . . . tied and subordinate to a monetary award." *Ellis v. United States*, 610 F.2d 760, 762 (Ct. Cl. 1979) (quoting *Austin v. United States*, 206 Ct. Cl. 719, 723, cert. denied, 423 U.S. 911 (1975)).

¹⁵ Section 1500 of the Judicial Code, 55 Geo. L. J. at 578.

citizens from presenting legitimate claims for resolution in the federal courts.¹⁶

CONCLUSION

This Court should reverse the *en banc* decision of the Federal Circuit.

Respectfully submitted,

Of Counsel:

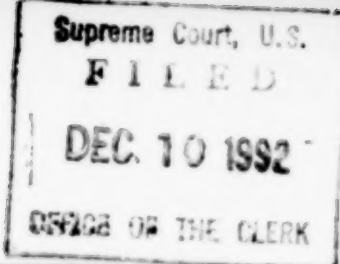
MARY V. DICRESCENZO
NATIONAL ASSOCIATION OF
HOME BUILDERS
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0200

ALBERT J. BEVERIDGE, III *
VIRGINIA S. ALBRECHT
DAVID G. ISAACS
BEVERIDGE & DIAMOND, P.C.
1350 I Street, N.W.
Suite 700
Washington, D.C. 20005
(202) 789-6000

Counsel for Amicus

* Counsel of Record

¹⁶ Furthermore, such a doctrine is at odds with the fundamental rule of statutory construction that a court will avoid an interpretation of a federal statute which raises serious constitutional problems or results in an unconstitutional construction. See, e.g., *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). Where two statutes are at issue, they should be read to avoid an unconstitutional result and to give force to each. See *Ruckelshaus v. Monsanto*, 467 U.S. at 1018-19 (declining to read federal pesticide law as withdrawing Tucker Act remedy in the event the effect of the pesticide law is to take property. The *UNR* court's reading of Section 1500 would preclude parties from asserting takings claims under the Fifth Amendment against the Government if they have also filed claims challenging a permit denial, seeking equitable relief, or other actions. Such a reading fails to give meaning to both Section 1500 and the Tucker Act, and therefore is inconsistent with well-established rules of statutory construction.



No. 92-166

IN THE
Supreme Court of the United States

OCTOBER TERM, 1992

KEENE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICUS CURIAE*
STATE OF ALASKA ON BEHALF OF PETITIONER

CHARLES E. COLE

Attorney General for the State of Alaska

Office of the Attorney General

P.O. Box K - State Capitol

120 4th Street, 4th Floor

Juneau, Alaska 99811-0300

(907) 465-3600

Attorney of Record

RONALD G. BIRCH

J. GEOFFREY BENTLEY

BIRCH, HORTON, BITTNER AND CHEROT

1155 Connecticut Avenue, N.W.

Suite 1200

Washington, D.C. 20036

(202) 659-5800

Of Counsel

December 10, 1992

Balmar Legal Publishing Services, Washington, D.C. (202) 682-9800

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IN THE
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BRIEF OF AMICUS CURIAE
STATE OF ALASKA ON BEHALF OF PETITIONER

The State of Alaska, through its Attorney General, pursuant to Rule 37.5 of the Supreme Court, hereby submits this brief, *amicus curiae*, in support of petitioner, Keene Corporation, for reversal of the decision below by the Court of Appeals for the Federal Circuit in *UNR Industries, Inc. v. United States*, 962 F.2d 1013 (Fed. Cir. 1992).

**INTEREST OF THE STATE OF ALASKA AS
AMICUS CURIAE**

The interest of the State of Alaska in this matter is to correct the ruling below, which erroneously overturned nearly forty years of precedent interpreting 28 U.S.C. § 1500 (1982), and ultimately extended beyond the jurisdiction of the court. Unless reversed by this Court or markedly restricted in its scope, the ruling by the Federal Circuit, on a matter long regarded as "settled," *Truckee-Carson Irrigation District v. United States*,

223 Ct.Cl. 684, 685 (1980), threatens to bar parties such as Alaska from litigating, simultaneously, in the district courts and in the U.S. Court of Federal Claims,¹ separate causes of action, each of which is within the exclusive jurisdiction of the court in which the action is brought and neither of which, if decided on the merits, would be *res judicata* as to the other.

The State of Alaska is the plaintiff in an action in the Claims Court styled *State of Alaska v. United States*, No. 92-314L, filed April 30, 1992. This action, brought under the Tucker Act, 28 U.S.C. § 1491 (1982), seeks compensation due Alaska under the Fifth Amendment to the Constitution (U.S. CONST. amend. V), for the alleged legislative taking of the State's royalty and other property interests in oil reserves found on Alaska's North Slope. The taking is alleged to have occurred as a result of enactment of § 7(d) of the Export Administration Act of 1979 (50 U.S.C. app. §§ 2401-2420) (the "EAA"), and rules promulgated thereunder, adopted by Executive Order No. 12730 (1990), reprinted as a note in 50 U.S.C.A. § 1701 (West 1991). The EAA forbade the export of crude oil transported from the North Slope to the port of Valdez, Alaska, via the Trans-Alaska Pipeline System ("TAPS"), unless Congress enacted another law approving an export license granted by the President.

At the same time Alaska filed its complaint in the Claims Court, it also filed a complaint, styled *State of Alaska v. Franklin, et al.*, Case No. A92-364 CI, in the United States District Court for the District of Alaska, pursuant to jurisdiction conferred on that court by 28 U.S.C. §§ 1331 and 1337 (1982). That action seeks a declaration that § 7(d) of the EAA (and § 28(u) of the Mineral Lands Leasing Act of 1920, as amended (30 U.S.C. § 185(u)), which the State alleges governs the export

¹ The Federal Courts Administration Act of 1992, Pub. L. No. 102-572, § 902, 106 Stat. 4506 (1992), changed the name of the United States Claims Court to the United States Court of Federal Claims. References herein to the "Claims Court" should be understood to refer to the Court of Federal Claims.

of TAPS crude oil or would govern if § 7(d) were to be found void or otherwise no longer to be in effect) is unconstitutional. Alaska also asks that the secretaries of Commerce and Interior be enjoined from enforcing § 7(d) and regulations adopted pursuant to the statute. The State's claims in the district court action are premised upon the Tenth Amendment to the Constitution, U.S. CONST. amend. X; the Guarantee Clause of the Constitution, U.S. CONST. art. IV, § 4; the Port Preference Clause of the Constitution, U.S. CONST. art. I, § 9, cl. 6; the Presentment Clause of the Constitution, U.S. CONST. art. I, § 7, cl. 2, 3; and the doctrine of separation of powers.

The United States moved to dismiss the State of Alaska's Claims Court action, pursuant to 28 U.S.C. § 1500 (1982), referring to the decision of the Federal Circuit in *UNR*. In particular, the government relied on the Federal Circuit's unexplained overruling in *UNR* of several cases wherein courts had found § 1500 did not apply or construed § 1500 to find exceptions, including *Casman v. United States*, 135 Ct.Cl. 647 (1956), *Hossein v. United States*, 218 Ct.Cl. 727 (1978), *Brown v. United States*, 358 F.2d 1002 (Ct.Cl. 1966), and *Boston Five Cents Savings Bank, FSB v. United States*, 864 F.2d 137 (Fed. Cir. 1988). *UNR*, 962 F.2d at 1022 & n.3. The State of Alaska opposed the government's motion to dismiss. On October 19, 1992, this Court granted certiorari in the *UNR* case. *Keene Corp. v. United States*, 113 S.Ct. 373, 61 U.S.L.W. 3301 (U.S. Oct. 19, 1992). At that point, Alaska moved in the Claims Court that further action in that court be stayed, pending decision in *Keene* and other cases pending before the Federal Circuit and elsewhere in the Claims Court. The State contended that the Claims Court would benefit from this Court's disposition of *Keene*, including any clarification of the Federal Circuit's overruling of *Casman* and the other cases.² The government, while

² Alaska's Motion for Stay pointed to other pending cases, including *Loveladies Harbor, Inc. v. United States*, No. 91-5050 (Fed. Cir.), and

not consenting to the State's motion for stay, moved to suspend proceedings pending this Court's decision in *Keene*. After oral argument, the trial court denied both the motion for stay and the government's motion to suspend proceedings as premature. *Alaska v. United States*, No. 92-314L (Order entered by Judge Gibson, October 30, 1992).

This Court's decision in *Keene*, therefore, is likely to affect, in a significant way, the Claims Court's consideration of the government's motion to dismiss the State of Alaska's Tucker Act claim. If *UNR* is reversed, as Petitioner urges, then the Federal Circuit's overruling of *Casman*, and the line of cases following *Casman*, likewise will be reversed. If the holding of the Federal Circuit in *UNR* is affirmed, this Court may, nonetheless, (1) limit its holding to the issues and facts presented by Petitioner's claim and leave the issue whether *Casman* should be overruled to a later day, or (2) vacate that portion of the ruling below which purported to overrule *Casman*.

SUMMARY OF ARGUMENT

The ruling below overturned a premise that had appeared to have been settled for a period of nearly forty years: that 28 U.S.C. § 1500 does not bar the Claims Court from retaining jurisdiction where a concurrent action seeks non-monetary relief that is within the exclusive jurisdiction of the district courts. That this premise had been articulated in a number of different cases over a long period of time was not a result of inconsistent interpretation of the statute. To the contrary, the body of law overturned by the Federal Circuit represented a consistent effort by the Claims Court and its predecessor, the Court of Claims, to balance the exclusive jurisdiction granted

Whitney Benefits, Inc. v. United States, No. 499-83L (Cl. Ct.), which pose questions regarding the interpretation of § 1500 resembling, more closely than *Keene*, the question presented by Alaska's district court and Claims Court actions.

the district courts, and the preservation of claimants' remedies available only in the district courts, with the original purpose of § 1500: to prevent successive and duplicative litigation in different courts with potentially conflicting outcomes. These rulings were consistent with both this Court's prior interpretation of the predecessor of § 1500, § 154 of the Judicial Code, c. 231, 36 Stat. 1087, 1138; § 1500 itself; and this Court's recently expressed views regarding the distinctions between district court and Claims Court jurisdiction.

The purpose of § 1500, as articulated by this Court, is to create, by statute, effects akin to *res judicata*. *Matson Navigation Co. v. United States*, 284 U.S. 352, 356 (1932). The ruling in *UNR*, although speaking in terms of *res judicata*, did not apply *res judicata* principles. This alone is reason to reverse.

The ruling below also went far beyond the issues before the Federal Circuit. The claimants below all sought monetary damages against the United States in both the district courts and the Claims Court, albeit on different theories of recovery. However, the holding of the Federal Circuit went beyond the issues and facts presented by the parties before the court, and set forth a broad new rule which bars the Claims Court from accepting or retaining jurisdiction over *any* claim when the plaintiff has pending before *any* other court a claim based on the same "operative facts." The broad new rule applies even when (1) the relief sought in the district court is equitable, but not monetary, in nature and beyond the power of the Claims Court to grant, (2) different legal rights are pleaded, (3) there is no possibility that adjudication of the two causes of action could reach conflicting outcomes, and (4) *res judicata* principles would not bar an action in the Claims Court. Because this part of the holding of *UNR* goes beyond the issues necessary to resolution of the controversy presented by the parties, it exceeds the jurisdiction of the court below and should be vacated.

ARGUMENT

I. THE RULING BELOW GOES BEYOND THE INTENTION OF CONGRESS TO CREATE BY STATUTE EFFECTS AKIN TO THE DOCTRINE OF *RES JUDICATA*.

The statute at issue, § 1500, reads as follows:

The United States Claims Court shall not have jurisdiction of any claim for or in respect to which the plaintiff or his assignee has pending in any other court any suit or process against the United States or any person who, at the time when the cause of action alleged in such suit or process arose, was, in respect thereto, acting or professing to act, directly or indirectly under the authority of the United States.

28 U.S.C. § 1500 (1982). Section 1500 is the functional ultimate successor to the Act of June 25, 1868, 15 Stat. 75, 77 (1868), which stated:

Sec. 8. And be it further enacted, That no person shall file or prosecute any claim or suit in the court of claims, or an appeal therefrom, for or in respect to which he or any assignee of his shall have commenced and has pending any suit or process in any other court against any officer or person who, at the time of the cause of action alleged in such suit or process arose, was in respect thereto acting or professing to act, mediately or immediately, under the authority of the United States, unless such suit or process, if now pending in such other court, shall be withdrawn or dismissed within thirty days after the passage of this act.

Concerning this section of the Act of June 25, 1868, the Chairman of the Senate Judiciary Committee stated:

The object of this amendment is to put to their election that large class of persons having cotton claims particularly, who have sued the Secretary of the Treasury and the other agents of the Government in more than a hundred suits that are now pending, scattered over the country here and there, and who are here at the same time endeavoring to prosecute their claims, and have filed them in the Court of Claims, so that after they put the Government to the expense of beating them once in a court of law they can turn around and try the whole question in the Court of Claims. The object is to put that class of persons to their election either to leave the Court of Claims or to leave the other courts. I am sure everybody will agree to that.

81 Cong. Globe, 40th Cong., 2d Sess. 2769 (1868) (Statement of Sen. Edmunds).

In short, Congress's purpose in enacting the statute was to prevent plaintiffs from whipsawing the government through forum-shopping and successive litigation in two courts, both having jurisdiction over the same cause of action and authority to grant monetary damages.

Through several revisions and reenactments, the revisers have claimed to make "changes in phraseology only," not of substance. Reviser's Notes, 28 U.S.C. § 1500, 1948 U.S. Code Cong. & Admin. News 1862; *see also* *UNR*, 962 F.2d at 1018-19. Thus, "only the intention of those who proposed the first version . . . to the Senate in 1868 is available as a guide to the legislative purpose of the section." Schwartz, "Section 1500 of the Judicial Code and Duplicate Suits Against the Government and its Agents," 55 *Georgetown Law Journal*, 573, 574 (1967).

In *Matson*, this Court affirmed a judgment by the Court of Claims dismissing an action by the Matson Navigation Company for recovery of increased wages and bonuses paid under a wartime "requisition charter" for the operation of seven mer-

chant vessels owned by the company. Subsequent to commencement of suit in the Court of Claims, the shipping company had brought separate suits in district court to recover the amounts paid as increased wages and bonuses. The Court of Claims dismissed the action before it on the ground that it lacked jurisdiction under "§ 154 of the Judicial Code, c. 231, 36 Stat. 1087, 1138." 284 U.S. at 355.

This Court, through Mr. Justice Stone, ruled that the legislature's purpose in enacting § 154 was to

require an election between a suit in the Court of Claims and one brought in another court against an agent of the Government, in which the judgment would not be *res adjudicata* in the suit pending in the Court of Claims. . . .

Id. at 356 (citation omitted). In support of this interpretation, this Court cited the statement of Sen. Edmunds quoted earlier in this section.

Because the United States was the named defendant in both *Matson's* Court of Claims suit and the district court action, this Court held that the shipping company's actions were not within the express language of § 154, which applied where one of the actions was brought against an officer or agent of the United States. *Id.* at 355-56. Similarly, because the United States was the defendant in both actions and would, therefore, be able to rely on *res judicata*, this Court also concluded that the legislative purpose behind the law, i.e., to substitute for *res judicata* principles in circumstances where, as *res judicata* was then defined, such would not be available to the government as a defense, also did not require dismissal of the shipping company's suit in the Court of Claims. *Id.*³

³ See also Schwartz, *supra*, at 574: "[§ 1500] was intended to prevent a suit against the United States based on issues decided adversely to the claimant in an earlier unsuccessful suit against a government officer where

A. The Determination Whether The Doctrine Of Res Judicata Should Apply In The Claims Court Requires More Than A Comparison Of Operative Facts.

The "rule" enunciated in *UNR* is inconsistent with the interpretation of § 154 in *Matson*, and by implication its successor, § 1500, as a law to provide the functional equivalent of *res judicata* effects where such did not exist under the common law of that time. The *UNR* court clearly understood that § 1500, as interpreted in *Matson*, was intended to have effects akin to *res judicata*, as it held:

[I]n accordance with the words, meaning, and intent of section 1500: 1) if the same claim is pending in another court at the time the complaint is filed in the Claims Court, the Claims Court has no jurisdiction . . . 2) if the same claim is filed in another court after the complaint is filed in the Claims Court, the Claims Court is by that action divested of jurisdiction . . . 3) if the same claim has been finally disposed of by another court before the complaint is filed in the Claims Court, ordinary rules of *res judicata* and available defenses apply.

UNR, 962 F.2d at 1021 (emphasis supplied). The Federal Circuit, however, citing its own decision in *Johns-Manville Corp. v. United States*, 855 F.2d 1556, 1565 (Fed. Cir. 1988), cert. denied, 489 U.S. 1066 (1989), also held that "for the purposes of section 1500, two lawsuits involve the same 'claim'

the second suit would not have been precluded by rules of *res judicata*." The Supreme Court affirmed the dismissal of the shipping company's Court of Claims action in *Matson*, not on the basis of § 154 but, rather, in reliance upon the Suits in Admiralty Act of March 9, 1920, c. 95, 41 Stat. 525-28, under which "jurisdiction of maritime causes of action against the United States, arising out of the operation of merchant vessels for it, is vested exclusively in the district courts." *Matson*, 284 U.S. at 356-57 (citations omitted).

if they are based on the same operative facts." *UNR*, 962 F.2d at 1020. That limited scope of comparison is the failing of the *UNR* holding, because the mere congruency of certain operative facts is not sufficient to implicate the doctrine of *res judicata*.

To properly evaluate whether *res judicata* principles would, or should, apply, and, therefore, to determine whether in a particular case § 1500 should bar Claims Court jurisdiction, requires a further level of inquiry. "[U]nder the doctrine of *res judicata*, a judgment 'on the merits' in a prior suit involving the same parties or their privies bars a second suit based on the same cause of action." *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 326 (1955) (emphasis supplied). "A cause of action does not consist of facts, but of the unlawful violation of a right which the facts show." *Nevada v. United States*, 463 U.S. 110, 130 n.12 (1983) (citing *Baltimore S.S. Co. v. Phillips*, 274 U.S. 316, 321 (1927)). In determining whether successive lawsuits involve the same cause of action and *res judicata* should, therefore, apply, the following factors are considered:

- (1) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts.

C.D. Anderson & Co., Inc. v. Lemos, 832 F.2d 1097, 1100 (9th Cir. 1987) (citation omitted).

The determination of when *res judicata* should apply, accordingly, requires an inquiry that goes beyond a simple comparison of operative facts. While the overlap of "operative facts," or a "transactional nucleus of facts," may be important in determining whether two claims constitute the same cause of action, see *Anderson*, 832 F.2d at 1100, other factors must be considered. As a statute this Court found in *Matson* was in-

tended to codify principles akin to *res judicata*, § 1500 likewise requires a broader inquiry. Inquiry, as in *UNR*, into only the "operative facts," is inadequate and leads to results not contemplated by Congress.

B. The Ruling Below Erroneously Departs From Prior Rulings Which Recognized The Inadequacy Of A Comparison Limited To Operative Facts.

The focus of the Claims Court in *Johns-Manville* and *UNR* on "operative facts" is traceable to the opinion of the Court of Claims in *British American Tobacco Co., Ltd. v. United States*, 89 Ct.Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940). There, the Court inquired, appropriately in light of *Matson*, into whether the plaintiff's district court and Court of Claims suits were based on the same cause of action, but limited its written analysis to a review of the "facts existing and operating in both cases." *British American*, 89 Ct.Cl. at 440.

Notwithstanding the somewhat adumbrated analysis of *British American*, subsequent decisions of the Court of Claims; its successor, the Claims Court; and the Federal Circuit (including *Casman* and other cases), explicitly recognized that comparison of only operative facts was insufficient to determine when two causes of action were sufficiently the same that § 1500 should bar prosecution of one in the Claims Court. The principle of *Casman*, that § 1500 should not preclude Claims Court jurisdiction where a concurrent action sought equitable relief available only in the district courts, was adhered to consistently prior to *UNR*.

Indeed, it was regarded as "settled law that § 1500 does not bar a proceeding in this Court, asking monetary relief, if the other pending suit seeks only affirmative relief such as an injunction or a declaratory judgment." *Truckee-Carson Irrigation District v. United States*, 223 Ct.Cl. 684, 685 (1980) (citations omitted).

This Court, in *Pennsylvania Railroad Co. v. United States*, 363 U.S. 202 (1960), showed no inclination to dispute the premise of *Casman*. In *Pennsylvania Railroad*, the railroad sued in the Court of Claims to recover the difference between lower rates for transportation of steel for export and higher domestic rates, which the General Accounting Office claimed were inapplicable, unreasonable and unlawful. The Court of Claims suspended proceedings to allow the Interstate Commerce Commission ("ICC") to review the rates. When the ICC disallowed the higher rates, the railroad (1) sued in district court to enjoin and set aside the ICC's order; and (2) sought a further stay of the Court of Claims proceedings pending district court review of the ICC's action. The government moved for dismissal of the Court of Claims action, contending that § 1500 was triggered by the railroad's action for district court review. The Court of Claims refused to dismiss the action, but did deny the railroad's request for a stay. *Id.* at 204.

On review, this Court, although it did not rule directly on the applicability of § 1500, held that "since the Railroad had a right to have the [ICC's] . . . order reviewed, and only the District Court had the jurisdiction to review it, the Court of Claims was under a duty to stay its proceedings pending this review." *Id.* at 205-06. It, therefore, appeared that this Court had given its imprimatur to preserving the availability to litigants of different forms of relief available only in different courts.

Against this background, the Federal Circuit noted in *Johns-Manville*, Congress's intention "to force an election where both forums could grant the same relief, arising from the same operative facts." 855 F.2d at 1564 (emphasis added). The Claims Court followed *Johns-Manville* when, in *Webb & Associates, Inc. v. United States*, 19 Cl.Ct. 650 (1990), it articulated the standard for dismissal under § 1500 as a two-part test:

(1) whether the potentially conflicting cases arise from the same operative facts, and (2) whether the forums entertaining the cases can grant the same relief.

Id. at 652 (citing *Johns-Manville*, 855 F.2d at 1564); see also *Hill v. United States* 8 Cl.Ct. 382, 386 (1985) (claim encompasses "actions which have the same operative facts and request the same substantive relief."). Although the Federal Circuit purported in *UNR* to "decline to disturb . . . *Johns-Manville*," 962 F.2d at 1024, in fact, it overruled a significant part of the *Johns-Manville* holding, and exceeded the grasp of the statute intended by Congress, when it eliminated the exception found in *Casman* and other cases.

C. The Limited And Exclusive Jurisdiction Of the District Courts And The Claims Courts Over Certain Claims And Remedies Illustrates That Res Judicata Principles Do Not Automatically Require Dismissal Of A Contemporaneous Action In The Claims Court.

It is beyond dispute that the jurisdictions of the district courts and the Claims Courts are nearly mutually exclusive: the power of the district courts to grant declaratory and injunctive relief is, by and large, beyond the jurisdiction of the Claims Court, and the power to grant compensation (beyond \$10,000) for the government's taking of a property interest is not within the jurisdiction of the district courts. See 28 U.S.C. § 1346(a)(2); *Bowen v. Massachusetts*, 487 U.S. 879, 905 (1988). See also *United States v. King*, 395 U.S. 1, 3-4 (1969) (jurisdiction of Court of Claims limited to judgments for money only; equitable and other non-monetary relief not available without express statutory consent).⁴ Suits against officers of

⁴ Congress has granted the Claims Court very limited jurisdiction to grant declaratory and injunctive relief in government employment and contract actions, 28 U.S.C. § 1491(2) and (3), the availability of which is not at issue here.

the government for declaratory relief are remitted to the district courts. See *Austin v. United States*, 206 Ct.Cl. 719, 726, *cert. denied*, 423 U.S. 911 (1975).

On the other hand, where the amount in issue in the plaintiff's suit against the government for compensation exceeds \$10,000, the Claims Court has exclusive jurisdiction. 28 U.S.C. §§ 1346(a)(2) and 1491(a)(1); *Blanchard v. St. Paul Fire & Marine Ins. Co.*, 341 F.2d 351, 358 (5th Cir.), *cert. denied*, 382 U.S. 829, (1965).

The fact that different relief is sought (for example, equitable relief rather than damages), let alone the fact that the relief sought in one forum may be beyond the power of another forum to grant, certainly serves to distinguish one cause of action from another. In that circumstance, following the four-part test discussed in *C.D. Anderson & Co., Inc. v. Lemos*, 832 F.2d 1097, 1100 (9th Cir. 1987), there is less likelihood that rights or interests established by the first judgment would be impaired or extinguished in the second action. Thus, there is less likelihood that *res judicata* would apply. Also weighing against the applicability of *res judicata*, where it is claimed, in the district court, that the Constitution has been violated or that the government has otherwise acted unlawfully, and, in the Claims Court, that a taking of property for a public purpose has occurred without just compensation, the two suits concern infringement of different rights. See *id.*

The independence of separate causes of action for declaratory relief and compensation for a regulatory taking has been aptly summarized by the Court of Claims in a different context. In *Deltona Corp. v. United States*, 224 Ct.Cl. 662 (1980), the plaintiff first sought, in district court, a declaration that the U.S. Army Corps of Engineers had arbitrarily and otherwise unlawfully denied a dredging permit. In a second action, brought by Deltona in the Court of Claims for compensation for property taken as a result of the permit denials, intervenors in the district

court action sought intervenor status in the takings case. The Court of Claims, however, denied intervention because it found the cases "independent of one another." *Id.* at 664.

[A]pplicants ultimately wish to block Deltona from receiving . . . permits to dredge and fill swamp wetlands. . . . Nothing this court can do will cause the lands to be dredged and filled; that result is a matter entirely in the hands of the district court, with its declaratory and injunctive powers. Should this court determine a taking has occurred, . . . Deltona will be entitled to a sum of money from the United States, but the wetlands will remain intact. If it is decided a taking has *not* occurred, again the status quo is perpetuated. . . . [W]hat ultimately happens to the wetlands will happen regardless of any future decision we may make.

Id. at 665.

Notwithstanding the obvious independence of causes of action seeking declaratory and injunctive relief in the district court and compensation in the Claims Court, the Federal Circuit's enunciation of an overly simplistic "operative facts" standard in *UNR* has led the government to file numerous motions to dismiss. These have included not only Alaska's suit, but also suits for compensation by plaintiffs seeking declaratory and injunctive relief in various other district court actions. Other suits which have been dismissed, or are subject to pending motions to dismiss, include (1) *Southern Ute Indian Tribe v. United States*, No. 92-99L (order of dismissal entered by Judge Bruggink, October 5, 1992), in which an Indian tribe brought suit in district court to enjoin the Secretary of Interior for breaching fiduciary duties to the tribe and in the Claims Court for monetary damages for alleged past failures to protect tribal resources; (2) *Loveladies Harbor, Inc. v. United States*, No. 91-5050 (Fed. Cir.), where plaintiff sued in district court to set

aside a Corps of Engineers' wetlands dredging permit denial, and (3) *Whitney Benefits Inc. v. United States*, No. 499-83L (Cl.Ct.), where the plaintiff filed suit in district court to compel a government tender of coal lands for exchange under the provisions of the Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1201 *et seq.*

Viewed transactionally, it is inconceivable that all of the Claims Court cases in which the government seeks dismissal pursuant to § 1500 on the basis of *UNR* would be absolutely barred under *res judicata* principles by a decision on the merits in the related district court case. This is because, in light of the exclusive and limited jurisdiction of the district and claims courts, neither court can fashion relief which reaches every aspect of the transaction.⁵ If, for example, even though the District Court for Alaska could grant Alaska's request for prospective declaratory and injunctive relief, it could not address the matter of Alaska's claim for compensation for the past legislative taking of its property interest. The parties might be precluded from relitigating certain issues in the Court of Claims, under the doctrine of collateral estoppel, but the doctrine of *res judicata* would not preclude Alaska's separate cause of action for compensation. Indeed, there is no likelihood of the inconsistent outcomes which were at the root of Congress's concern in 1868.

⁵ The evolution of the jurisdiction of the district and claims courts has thus substantially altered the environment in which § 1500 operates. Its predecessor, § 154, was enacted *because* the different courts had concurrent jurisdiction over the same cause of action. The enactment of the Tucker Act, 28 U.S.C. § 1491 (1982), and the Declaratory Judgment Act, 28 U.S.C. §§ 2201-02 (1982), have largely eliminated the problem of concurrent jurisdiction. Application of § 1500, therefore, not only entails consideration of Congress's intent when the law was enacted but also how that section should interact with subsequently enacted statutes defining and limiting the jurisdiction of the district and claims courts.

Likewise, the Claims Court is not empowered to adjudicate the constitutionality of federal statutes, nor is it suited for inquiry into matters beyond its specialized expertise. The Supreme Court considered the demarcation between district court and Claims Court jurisdiction in *Bowen v. Massachusetts*, 487 U.S. 874 (1988), and concluded that the limited relief available in the Claims Court under the Tucker Act is not an adequate substitute for district court review of the lawfulness of government action. *Id.* at 904

In *Bowen*, the district court reversed a Department of Health and Human Services ruling which disallowed reimbursement to the State of Massachusetts of certain amounts for Medicaid services. The district court "did not purport to state what amount of money, if any, was owed" to the state, or order any payment to be made. *Id.* at 888. On appeal and before this Court, the government argued that the district court could not order the Secretary of Health and Human Services to pay "money damages" to the state and that the Claims Court held exclusive jurisdiction over the state's action under the Tucker Act. *Id.* at 890-91.

This Court, per Justice Stevens, held that the relief sought was not compensation for damages but, rather, enforcement of "the statutory mandate itself, which happens to be one for the payment of money." *Id.* at 900. Of more importance to the present controversy was the Court's discussion of the inadequacy of the relief available in Claims Court litigation:

The Claims Court does not have the general equitable powers of a district court to grant prospective relief. Indeed, we have stated categorically that 'the Court of Claims has no power to grant equitable relief.' As the facts of this case illustrate, the interaction between the State's administration of its responsibilities under an approved Medicaid plan and the Secretary's interpretation of his regulations may make it appropriate

for judicial review to culminate in the entry of declaratory or injunctive relief that requires the Secretary to modify future practices. We are not willing to assume, categorically, that a naked money judgment against the United States will always be an adequate substitute for prospective relief fashioned in the light of the rather complex ongoing relationship between the parties.

Id. at 905 (footnotes omitted). As further demonstration of the inadequacy of Claims Court review of agency action, this Court noted that

the nature of the controversies that give rise to disallowance decisions typically involve state governmental activities that a district court would be in a better position to understand and evaluate than a single tribunal headquartered in Washington. We have a settled and firm policy of deferring to regional courts of appeals in matters that involve the construction of state law. That policy applies with special force in this context because neither the Claims Court nor the Court of Appeals for the Federal Circuit has any special expertise in considering the state-law aspects of the controversies that give rise to disallowances under grant-in-aid programs. It would be nothing less than remarkable to conclude that Congress intended judicial review of these complex questions of federal-state interaction to be reviewed in a specialized forum such as the Court of Claims. More specifically, it is anomalous to assume that Congress would channel the review of compliance decisions to the regional courts of appeals . . . and yet intend that the same type of questions arising in the disallowance context should be resolved by the Claims Court or the Federal Circuit.

Id. at 907-08 (citations and footnotes omitted).

Just as in *Bowen*, it would be "remarkable to conclude" that Congress, having vested exclusive jurisdiction to grant declaratory and injunctive relief in the district courts, intended that § 1500 should force plaintiffs to choose between prospective equitable relief and compensation or, if equitable relief is chosen, to be deprived of a right to just compensation for a regulatory taking under the Fifth Amendment. The more likely conclusion is that Congress, in defining and limiting the jurisdiction of the district and Claims Courts, amended § 1500.

The conclusion that pending suits for declaratory and injunctive relief in the district courts should not bar suits in the Claims Court for compensation under the Fifth Amendment is entirely consistent with principles of *res judicata* set forth by this Court. In *Lawlor v. National Screen Service Corp.*, 349 U.S. 322 (1955), plaintiffs had entered into a settlement of a prior lawsuit seeking both injunctive relief and damages under the anti-trust laws. The lawsuit was dismissed "with prejudice." Several years later, the plaintiffs initiated a second suit for damages, against the same defendants and some new parties. This Court held that the doctrine of *res judicata* did not bar the second lawsuit.

A combination of facts constituting two or more causes of action on the law side of a court does not congeal into a single cause of action merely because equitable relief is also sought. And, as already noted, a prior judgment is *res judicata* only as to suits involving the same cause of action. There is no merit, therefore, in the respondents' contention that petitioners are precluded by their failure in the 1942 suit to press their demand for injunctive relief. Particularly is this so in view of the public interest in vigilant enforcement of the anti-trust laws through the instrumentality of the private treble-damage action.

Acceptance of the respondents' novel contention would in effect confer on them a partial immunity from civil liability for future violations. Such a result is consistent with neither the antitrust laws nor the doctrine of *res judicata*.

Id. at 328-29 (footnote omitted).

Similar reasoning shows that § 1500 should not be held to require dismissal of a Tucker Act claim because the plaintiff is simultaneously pursuing declaratory and injunctive relief in a different court. An action for equitable relief should not be held to "merge" all other possible causes of action, including an action for compensation for a regulatory taking. Such a holding would thereby immunize the government from being required to pay compensation under the Fifth Amendment, a result nowhere suggested in the history of the statute.

II. BECAUSE A RULING THAT § 1500 BARS CONCURRENT PROSECUTION OF SEPARATE ACTIONS FOR EQUITABLE AND MONETARY RELIEF WAS NOT NECESSARY TO THE RESOLUTION OF THE CONTROVERSY BEFORE THE COURT, THAT PORTION OF THE RULING SHOULD BE VACATED.

A. The Issue Of Applicability Of § 1500 To Causes Of Action Seeking Relief Uniquely Within The Jurisdiction Of Different Courts Was Not Before The Court Of Appeals.

UNR, and the cases decided with *UNR*, including Petitioner's suit, involved parties pursuing alternative theories of monetary recovery against the United States. As summarized in the opinion by the Claims Court below, the claims were identical:

All complaints in other courts and the Claims Court cases seek recovery for costs and expenses incurred

and other damages engendered by suits brought by shipyard workers against plaintiffs alleging injury from exposure to asbestos or asbestos products.

Keene Corp. v. United States, 17 Cl.Ct. 146, 156 (1989), *aff'd*, 962 F.2d 1013 (Fed. Cir.), *cert. granted*, 113 S.Ct. 373, 61 U.S.L.W. 3301 (U.S. Oct. 19, 1992).

In *British American Tobacco Co. Ltd. v. United States*, 89 Ct.Cl. 438 (1939), *cert. denied*, 310 U.S. 627 (1940), the Court of Claims rejected the argument that the term "claim" referred only to the legal theory on which suit was brought and not to the subject matter of the suit. *Id.* at 440. As the *UNR* court paraphrased the *British American* holding, "even though a district court action may sound in tort and the one in the Court of Claims may sound in contract, if they are based on the same operative facts, they are the same claim." *UNR*, 962 F.2d at 1019.

But the *UNR* court did not hold that Petitioner's and the other parties claims fell within the holding of *British American*, or even limit its holding to the questions presented by the pending claims of Petitioner and the other parties before it. Rather, in a footnote and without explanation, the *UNR* court went on to announce the overruling of *Casman v. United States*, 135 Ct.Cl. 647 (1956), and cases following *Casman*. *UNR*, 962 F.2d at 1022 n.3.

In *Casman*, the plaintiff alleged in his district court suit that he had been wrongfully terminated from his government position. The district court ordered his reinstatement, an equitable remedy that was beyond the power of the Court of Claims to grant. While the government's appeal from the district court order was pending, *Casman* commenced an action in the Court of Claims seeking a different remedy, a monetary judgment for back pay. That action could be brought only in the Court of Claims. *Casman*, 135 Ct.Cl. at 650. The Court of Claims refused to dismiss the second action because the relief sought in

the two cases was "entirely different" and the claim for back pay was

exclusively within the jurisdiction of this court, and there is no other court which plaintiff might elect. . . . On the other hand, the Court of Claims is without jurisdiction to restore plaintiff to his position.

Id. at 650 (citations omitted).⁶

The issue decided in *Casman*, i.e., the ability of a plaintiff to maintain a cause of action and obtain a form of relief in the Court of Claims that was beyond the power of the district courts while seeking district court relief not available in the Court of Claims, was not before the *UNR* court. Indeed, the *UNR* court was not required to reach the question of *Casman*'s continuing vitality.

The government, in its brief, merely asserted that "[t]he same 'claim' is deemed to exist when the suits involve 'the same operative facts and request the same substantive relief.'" *Brief for Appellee United States* before the United States Court of Appeals for the Federal Circuit in *UNR Industries, Inc., et al. v. United States*, at 21, quoting *Hill v. United States*, 8 Cl. Ct. 382, 386 (1985). It urged the Federal Circuit to overrule *Casman* only if *Casman* was found to apply. *Id.* at 43. As shown below, however, the appeals court did not apply *Casman* to the facts before it and, if it had done so, would have been required to conclude that *Casman* did not apply.

The Petitioner, Keene, did assert, citing *Casman*, that because its suit in the Claims Court included a Fifth Amendment claim for relief (for payments to asbestos-injured workers recouped from Keene by the government) different from the claims for monetary damages in its district court indemnification

⁶ Since *Casman* was decided, Congress has granted the district court jurisdiction to award back pay, up to \$10,000. See 28 U.S.C. § 1346(d).

suit, the Claims Court had jurisdiction. *UNR*, at 1024. But the Federal Circuit did not even decide that *Casman* was pertinent to Petitioner's Fifth Amendment claim. Rather, it simply noted, without discussion, that *Casman* had been overruled elsewhere in the opinion and "as of today, *Casman* and its progeny are no longer valid." *UNR* at 1025.

Had the effect of *Casman* on Petitioner's Fifth Amendment claim been considered, it clearly would not have been dispositive, because the holding of *Casman* was that a pending cause of action in another court, for a remedy, i.e., equitable relief, not available in the Claims Court, does not divest the Claims Court of jurisdiction over causes of action and remedies which are committed exclusively to its authority. Petitioner's district court suit for indemnification did not seek the equitable, declaratory and/or injunctive relief essential to the holdings of *Casman* and *Truckee-Carson Irrigation District*, among other cases. Thus, the overruling of *Casman* in the context of Petitioner's and the other claims before the Federal Circuit was, simply, dictum.

B. The Circuit Court's Ruling On An Issue Not Necessary To Resolve The Controversy Before It Was Beyond Its Jurisdiction.

This Court has consistently ruled that broad language unnecessary to the court's decision is not considered binding authority. *Kastigar v. United States*, 406 U.S. 441, 454-455 (1972); *McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981). As the Court of Appeals for the Seventh Circuit has explained:

[W]hat reasons there are against a court's giving weight to a passage found in a previous opinion . . . [include] the passage was unnecessary to the outcome . . . and therefore perhaps not as fully considered as it would have been if it were essential . . . the passage was not an integral part of the earlier opinion — it can be sloughed off without damaging

the analytical structure of the opinion, . . . the passage was not grounded in the facts of the case . . . [or] the issue addressed in the passage was not presented as an issue, hence was not refined by the fires of adversary presentation. All of these are reasons for thinking that a particular passage was not a fully measured judicial pronouncement . . . *and indeed that it may not have been part of the decision that resolved the case or controversy on which the court's jurisdiction depended (if a federal court).*

United States v. Crawley, 837 F.2d 291, 292-293 (7th Cir. 1988) (emphasis added).

A statement that is only dictum because it is not an issue between the parties to a controversy is, therefore, indistinguishable from a mere advisory opinion, or a judgment on an issue which has become moot. See *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990). As this Court has stated,

The requirements for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of suit. . . . This court is without power to give advisory opinions. . . . It has long been its considered practice not to decide abstract, hypothetical or contingent questions. . . .

Alabama State Federation of Labor v. McAdory, 325 U.S. 450, 461 (1945) (citations omitted). For a "controversy" to be justiciable,

[t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . It must be a real and substantial controversy admitting of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be on a hypothetical state of facts. . . . Where there is such a

concrete case *admitting of an immediate and definitive determination of the legal rights of the parties in an adversary proceeding upon the facts alleged*, the judicial function may be appropriately exercised. . . .

Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 240-41 (1937) (citations omitted) (emphasis supplied).

Because there was no controversy between the parties that required the *UNR* court to review the holding of *Casman*, the Federal Circuit's overruling of *Casman*, rendered in a footnote, without explanation, was not just dictum, suffering from all of the weaknesses of dicta adverted to in *Crawley*. It was, in fact, nothing more than a decision of an abstract or hypothetical question. It was beyond the jurisdiction of the court below and that portion of the decision should be vacated.

CONCLUSION

Section 1500 is a statute intended by Congress, and interpreted by this Court, to be a substitute for principles of *res judicata*. The doctrine of *res judicata* precludes relitigation, after a ruling on the merits, of the same cause of action. The decision of the Federal Circuit in *UNR*, focusing only on whether, under § 1500, the presence of the same "operative facts" in two separate causes of action precludes jurisdiction in the Claims Court, falls far short of the analysis required to determine when a cause of action is barred by application of *res judicata* principles.

Where the relief sought in the district court is equitable in nature and not for monetary damages, different legal rights are pleaded in the district court and Claims Court, and there is no possibility of conflicting outcomes, *res judicata* would not bar an action in the Claims Court. Thus, § 1500 should not be a jurisdictional bar solely because of an inadequate inquiry limited to "operative facts."

This reasoning is reflected in the consistent interpretation of § 1500 by this Court; the Claims Court and its predecessor, the Court of Claims; and the Federal Circuit, as barring jurisdiction in the Claims Court only where the two causes of action were based on the same facts and, also, both forums were capable of granting the same relief.

The conclusion that § 1500 should not be a bar follows from the limited and exclusive jurisdiction of the district court and Claims Court. The inadequacy of Claims Court jurisdiction to review governmental action has been recognized by this Court. Congress, through legislation defining and limiting the jurisdiction of the respective courts, has, by and large, dealt with the problem which confronted the drafters of the original version of § 1500, that of courts with concurrent jurisdiction and authority to grant monetary damages. It should not be assumed

that by directing claimants against the government to the district courts for some causes of action (i.e., for declaratory and injunctive relief), and to the Claims Court for compensation for a taking of property for a public purpose, Congress intended that § 1500 would deny those same claimants the right to the complete relief available only by litigation in both courts. Accordingly, the inadequate "operative facts" standard should be reversed.

Because the *UNR* court was not required to decide the issue whether a suit in district court for equitable (i.e., declarative and injunctive) relief should bar maintenance of a separate cause of action in the Claims Court for compensation, the Federal Circuit's overruling of *Casman* and other cases was beyond its

jurisdiction. For that reason, also, that portion of the ruling below should be vacated.

Respectfully submitted,

CHARLES E. COLE

Attorney General for the State of Alaska

Office of the Attorney General

P.O. Box K - State Capitol

120 4th Street, 4th Floor

Juneau, Alaska 99811-0300

(907) 465-3600

Attorney of Record

RONALD G. BIRCH

J. GEOFFREY BENTLEY

BIRCH, HORTON, BITTNER AND CHEROT

1155 Connecticut Avenue, N.W.

Suite 1200

Washington, D.C. 20036

(202) 659-5800

Of Counsel

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